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EXCEPTIONAL INNOVATION, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EXCEPTIONAL INNOVATION, LLC,

Plaintiff,

vs.

KONTRON AMERICA, INC.,

Defendant.

Case No. 3:07-CV-02041-LAB-LSP

**PLAINTIFF AND CROSS-DEFENDANT
EXCEPTIONAL INNOVATION'S
EARLY NEUTRAL EVALUATION
CONFERENCE STATEMENT**

AND RELATED CROSS-ACTIONS

1 I. INTRODUCTION

2 This is a contract dispute. Defendant and cross-claimant Kontron America, Inc. is a
3 manufacturer of electronic components. Plaintiff and cross-defendant Exceptional
4 Innovation, LLC ("EI") makes high-end consumer electronics. At issue in this case is the
5 execution of a purchase order for ETXexpress-PM modules (the "modules") manufactured
6 by Kontron and purchased by EI. In May 2005, when EI ordered 1000 modules, it was a
7 state of the art product that Kontron promised to begin delivering by July of 2005. By the
8 time Kontron actually delivered the first working modules in August of 2006, they were
9 over a year behind schedule and in the fast moving world of high technology the modules
10 were no longer state of the art components. During the course of the 12-14 month delay
11 EI's engineers spent countless hours attempting to de-bug Kontron's defective modules in
12 an effort to get them up and running. Unable to produce any working modules in a timely
13 manner, EI was forced to turn down order after order for its product.

14 Despite its untimely and inept performance, Kontron continued to insist on full
15 payment for the modules. As a result, EI filed this declaratory relief action seeking only a
16 declaration that it was not required to tender full payment to Kontron. Given Kontron's
17 aggressive position, EI has drafted and is prepared to file a First Amended Complaint
18 seeking breach of contract damages for Kontron's lengthy delay in performance. If this
19 action does not settle at the Early Neutral Evaluation Conference, EI will seek to file the
20 First Amended Complaint within the next two weeks.

21 Kontron has now filed its own action seeking full payment of the approximately
22 \$210,000 it claims it is owed under the terms of its contract. Performance problems aside,
23 its claim appears to be based largely on the terms and conditions of its initial sale quote,
24 which contains a series of provisions designed to exculpate Kontron from any
25 responsibility for its poor performance. As detailed below, there is a long line of case law
26 specifically holding that such sales quotes do not constitute a binding contract, and that
27 Kontron can be held accountable for its failure to honor the terms of the sales contract.

1 II. FACTUAL BACKGROUND

2 A. The Agreement

3 In May 2005 EI's representatives flew from its Columbus, Ohio headquarters to
4 review Kontron's facilities and enter into negotiations with Kontron for the purchase of
5 1000 modules, among other items. On May 12, 2005, Kontron issued Sales Quotes, where
6 indicated that it would sell Exceptional Innovation an unspecified number of modules at a
7 set price. [Exhibit 1.] Kontron's Sales Quotes purported to include a long boilerplate list
8 of Terms and Conditions, which included one-sided terms such as waivers of the standard
9 warranties under the Uniform Commercial Code and a limitation of EI's remedies.

10 [Exhibit 2.] On May 12, 2005, EI responded by sending out its own Purchase Requests for
11 1000 modules. [Exhibit 3.] The Purchase Requests indicated that the "Date Required" for
12 the modules was June 1, 2005. The Purchase Requests further indicated that EI required
13 "300 units ASAP. The rest to follow within 12 months based upon demand." At various
14 times, Kontron issued various invoices that accompanied the delivered modules. [Exhibit
15 4.]

16 The modules in question were going to be incorporated into high end "smart
17 homes" systems – touchscreen systems that control all a home's devices: lighting, security
18 systems, air conditioning, audio, etc. Given the cutting edge nature of this project, the
19 modules were to be state of the art. The data processing and transferring systems in these
20 modules had to be the fastest available. The module was to come with a one gigabit
21 ethernet capability. Unfortunately, Kontron promised far more than it could deliver.
22 When the initial modules were sent in April 2005, aside from the myriad of other
23 problems, the modules came with only a 10/100 capability (whereas one gigabit is also
24 referred to as 10/100/100). In laymen's terms, EI received an item that transferred data ten
25 times slower than the item it ordered. The exponentially slower speed rendered the
26 modules unusable. This crucial error was the first in a long and well documented series of
27 mistakes by Kontron. What follows is an abridged history of Kontron's tortured attempts
28 to construct and deliver the modules.

1 On May 26, 2005, Kyle Virgin of EI wrote to a Kontron representative asking,
2 "What is the status of our panels [a reference to the modules, which had not been delivered
3 yet] and sending me a BIOS file?" [Exhibit 5.] The BIOS file is the "guts" of the modules
4 – the necessary software that boots up and runs the system. It was a continuing source of
5 difficulties. On August 15, 2005, Virgin again wrote to Kontron identifying at least 4
6 problems with the BIOS that Kontron supplied. He indicated that "[a]ll these issues need
7 resolved ASAP. We are getting ready to assemble units tomorrow for our trade show so
8 this has to be resolved." [Exhibit 5.] Over a week later, on August 23, 2005, Neal Fischer
9 of Kontron wrote back to say that their "engineers have been hard at work on the
10 Exceptional Innovation BIOS" but that there was some "Bad News" -- they had not been
11 able to solve all the problems with the BIOS. [Exhibit 6.]

12 On August 24, 2005, Fischer apologized for "all the trouble in getting a fix for you"
13 and indicated that Kontron would be shipping 5 of new modules to replace 5 previously
14 shipped "'bad' units." [Exhibit 7.] However, the new, purportedly good modules had
15 improper "fan/heatsinks" which EI had to fix by cannibalizing that part from the "bad"
16 modules. Thus, 3 months after Kontron agreed to ship 300 modules "ASAP," Kontron
17 was still struggling to ship 5 working modules (which admittedly needed a fix when
18 shipped). Not surprisingly, these 5 modules also failed. On September 28, 2005, Fischer
19 indicated that there were still "some issues" with the BIOS. [Exhibit 8.] On October 27,
20 2005, Fischer suggested a possible solution that "may work to solve different problems
21 you are seeing." [Exhibit 9.]

22 On January 17, 2006, Virgin wrote to Kontron to request the shipment of 4
23 modules. [Exhibit 10.] On January 18 (after Kontron confirmed delivery of 4 modules),
24 Virgin wrote complaining "[w]e need to have a discussion as to where you guys are at for
25 shipping us quantity units. We were supposed to have 50 Gig ETXexpress units by end of
26 December 2005 but never received them. Currently we have 1 dev unit. What is the hold-
27 up? We have units [touchscreens] to build and have no modules to fill them." [Exhibit
28 11.] On January 19, Virgin wrote to Kontron to complain that "3 of the 4 modules [that

1 Kontron shipped] are broken” because of “poor packing from Kontron.” [Exhibit 12.] On
2 January 24, 2006, Virgin complained about being invoiced for 4 modules when Kontron
3 shipped only 2; Kontron responded that it was “working on getting you 2 more out.”
4 [Exhibit 13.] On January 25, Virgin wrote to engineers at Kontron to complain that there
5 was a power supply problem, and in frustration asked, “what level of testing are you guys
6 going through before you send me these modules? I’m getting lemons here. When can I
7 expect more working units? The module I have here is 1 out of 6 that works.” [Exhibit
8 14.] Virgin also wrote that day to complain that “I still have not received the promised
9 production schedule of ETXexpress delivery to Exceptional Innovation from anyone at
10 Kontron.” [Exhibit 15.]

11 On January 27, Virgin again wrote to Kontron engineers to complain that “another
12 one bites the dust. The 4th and final module from the original 4 you sent me has stopped
13 working.” Kontron responded that it had found a problem with the modules that was
14 leading to blown fuses and based on this and “other data” had “assembled an engineering
15 team to look into these problems pronto.” [Exhibit 16.] On January 30, Virgin wrote that
16 he “figured out what is causing the video performance hit on the new BIOS” – and
17 Kontron responded that he was “right.” [Exhibit 17.] In other words, EI had solved some
18 of the problems with Kontron’s modules.

19 On March 31, 2006, Kontron wrote that there would be another delay – 250
20 modules that were supposed to be delivered in March “will be delayed. We are looking at
21 the end of April.” [Exhibit 18.] However, even these units were still flawed. On June 29,
22 2006, Kontron wrote that they had identified a “failure” involving the “power supply
23 circuits,” which Kontron needed to fix. [Exhibit 19.] On June 30, 2006, Kontron wrote
24 that it had “finalized [its] investigation” of malfunctioning boards returned by EI and
25 admitted that they needed to be replaced. [Exhibit 20.] After additional struggles through
26 the month of July, in August 2006 Kontron was finally able to ship significant quantities of
27 the module. However, by the time the new modules were finally completed they were no
28 longer state of the art and had been replaced by newer and faster technology.

1 **B. The Damages**

2 The damage allegations detailed in EI's proposed First Amended Complaint fall
3 into two categories. First, EI will be seeking compensation for the hundreds of man hours
4 its technicians spent attempting to de-bug the defective modules. As the emails indicate, it
5 was the EI engineers who eventually remedied the BIOS problem, as well as a number of
6 other defects found in Kontron's modules. Second, EI will be seeking damages in the
7 form of lost profits. Once the initial contract was signed and Kontron promised this
8 modules by the summer of 2005, EI began marketing its product with the appropriate
9 production dates. When orders began coming in EI had no choice by to turn them down.
10 For months, EI had no choice but to turn down all orders for its touchscreen panel.
11 Although not yet quantified, EI will be seeking considerable lost profit damages.

12 In what follows, EI briefly demonstrates that the relevant law and the undisputed
13 and easily provable facts support its position in this case. In addition, EI has attached as
14 Exhibit A a timeline of some of the important events and supporting documentation.

15 **III. Kontron's Performance Constitutes A Material Breach Of The Agreement.**

16 The most telling aspect of this case is the course of performance by Kontron. EI's
17 Purchase Requests are dated May 12, 2005. [Exhibit 3.] In the Purchase Requests, EI
18 ordered 1000 of the modules (and assorted other products). These Purchase Requests give
19 the "Date Required" as "June 1, 2005." The Purchase Requests state "300 units requests
20 ASAP. The rest to follow within 12 months based upon demand." Kontron plainly did not
21 meet these performance terms. Kontron did not deliver any modules for several months –
22 not ASAP. As discussed above, there were significant and continuing problems with the
23 few modules that were shipped. It was not until August 2006 when fully operational
24 modules were finally delivered, well beyond the dates required under the contract.

25 **A. Kontron's Breaches Are Well-Documented.**

26 The parties' written correspondence confirms this course of events and that EI made
27 Kontron well aware that its performance was unacceptable. The parties have provided the
28 Court with some of the parties' email correspondence. As outlined above, that

1 correspondence documents long delays in delivery, problems with the installed software
2 (BIOS), and flaws in the hardware components. Kontron's breaches entitled Exceptional
3 Innovation to monetary damages. Comm. Code § 2714(1) ("Where the buyer has accepted
4 goods and given notification . . . he or she may recover, as damages for any nonconformity
5 of tender, the loss resulting in the ordinary course of events from the seller's breach as
6 determined in any manner that is reasonable."). EI's acceptance of the modules does not
7 change alter its ability to recover damages for breach of contract -- "[a]cceptance does not
8 of itself impair any other remedy provided by this division for nonconformity." Comm.
9 Code § 2607(2).

10 B. **Exceptional Innovation Made Clear That These Breaches Required**
11 **Serious Reductions In Contract Pricing.**

12 Under U.C.C. § 2-607(3)(A), a buyer who receives nonconforming goods must give
13 the seller notice of the non-conformity in order to retain its right seek remedies for the
14 breach of contract. Comm. Code § 2607(3)(A). However, the Ninth Circuit has held that
15 "Section 2.607's notice requirement should not be applied stringently." *Kern Oil &*
16 *Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730 (9th Cr. 1988). The official comment to
17 U.C.C. § 2-607 indicates that "[t]he content of the notification need merely be sufficient to
18 let the seller know that the transaction is still troublesome and must be watched." As
19 outlined above, there was near constant communications between EI and Kontron in which
20 EI explicitly referenced all of the problems with Kontron's performance. In addition, in
21 later correspondence, EI made it unmistakably clear to Kontron that its serious breaches of
22 the contract required substantial reductions in the prices previously agreed to.

23 On March 16, 2007, Exceptional Innovation wrote a lengthy letter detailing
24 Kontron's performance problems and seeking a substantial adjustment in the amounts
25 owing. [Exhibit 21.] On May 11, 2007, Kontron offered a 10% discount on outstanding
26 invoices and demanded payment of \$157,553 "immediately." [Exhibit 22.] EI responded
27 on May 30, 2007 and objected that the offered "adjustment" was not adequate and sought
28 "something closer to the \$100,00 figure . . . previously requested." EI's response attached

1 a number of previous communications “enumerating the many problems encountered
2 along the way.” Kontron, however, has proved unwilling to take responsibility for its
3 errors and mistakes and has been willing to consider only small, if any, adjustments to the
4 contractual pricing.

5 **IV. Exceptional Innovation Intends To File A First Amended Complaint Seeking**
6 **Damages For Breach Of Contract And Fraud.**

7 EI’s current complaint seeks only declaratory relief. However, if this litigation
8 continues, EI will seek to amend the complaint to state claims for breach of contract and
9 fraud.¹

10 As discussed above, there is overwhelming evidence, much of it in documentary
11 form, that Kontron violated the parties’ agreement. These breaches were certainly
12 material. In fact, by the time Kontron did perform, the state of the art devices that EI had
13 sought were no longer state of the art. As a general rule, the computer processing power
14 doubles every two years²; thus, something state of the art a year ago is far slower than
15 something state of the art today. In addition, as discussed previously, Kontron’s delivery
16 of nonconforming goods led EI to miss out on significant sales and also caused EI’s
17 engineers to spend significant time and energy working to fix the problems with Kontron’s
18 modules.

19 Thus, Kontron’s breach of contract and fraudulent misrepresentations of its ability
20 to deliver working modules led to significant damages for EI. These damages far eclipse
21 the \$210,000 that EI purportedly owes under the contract.

22 **V. The Terms Of The Parties’ Contract Do Not Include The Onerous Terms And**
23 **Conditions Included with Kontron’s Sales Quotes.**

24 Much of this case does not depend upon any disputed contract terms. However,
25 there will be some dispute as to whether certain terms, such as the attorney’s fees clause
26 and a purported waiver of standard warranties, form part of the contract. In this respect,

27 _____
28 ¹ Exceptional Innovation will of course first seek a stipulation from Kontron to file this
complaint. However, failing that, it will file the appropriate motion.

² This commonly accepted proposition is known as Moore’s Law.

1 this case provides a classic example of the battle of forms in commercial transactions. The
 2 opening salvo was Kontron's Sales Quotes. [Exhibit 1.] EI next sent Purchase Requests.
 3 [Exhibit 3.] Kontron then followed with Invoices. [Exhibit 4.] Although it is unclear
 4 from Kontron's answer and cross-complaint, Kontron may be relying on provisions such
 5 as these to excuse its failure to perform. Thus, an important question in this case is likely
 6 to be whether these Terms and Conditions form part of the parties' agreement.

7 The initial legal question in analyzing what terms form part of the parties'
 8 agreement is which document is the offer under UCC 2-207 (Cal. Civil Code § 2207). *See*,
 9 *e.g.*, *Litton Microwave Cooking Prods. v. Leviton Manufacturing Co., Inc.*, 15 F.2d 790,
 10 794 (8th Cir. 1994) ("For a 'battle of the forms' to arise and trigger the provisions of § 2-
 11 207, there must be conflicting forms to begin with, each of which satisfies the common-
 12 law or statutory requirements for an offer. If the first form is not an offer, there can be no
 13 battle."). Kontron alleges that the Sales Quotes constitute an offer. (Counterclaim ¶¶ 10-
 14 12.) However, these Sales Quotes are not legal offers.

15 The UCC does not define offer; therefore, courts look at the common law
 16 precedents regarding offer. *See Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937,
 17 955-56 (E.D. Wisc. 1999). Under California law,³ an offer must "justify another person in
 18 understanding that his assent to that bargain is invited and will conclude it." Restatement
 19 (Second) of Contracts § 24. An offer must be such as to enable the recipient to "create a
 20 contract without further action by the offeror." 1 Witkin, Summary of Cal. Law: Contracts
 21 § 125; *City of Moorpark v. Moorpark Unified Sch. Dist.*, 54 Cal. 3d 921, 930 (1991).

22 There are two reasons that Kontron's Sales Quotes fail to qualify as contractual
 23 "offers." First, they are not sufficiently definite. They lack any indication of the quantity
 24 involved, the time for delivery, method of delivery, etc. These reasons have led many
 25 courts to conclude that price quotes generally do not constitute offers. *See Rich Prods.*

27 ³ Exceptional Innovation will assume for purposes of this statement that California law
 28 governs the dispute. However, there may be a choice-of-law question in this case between
 California and Ohio law. Exceptional Innovation is not waiving any right to argue at a
 later point that Ohio law controls.

1 *Corp.*, 66 F. Supp. 2d at 956 (“Generally speaking, a price quotation is considered an
 2 invitation for an offer, rather than an offer to form a binding contract. . . . The purchase
 3 order usually is the first document having the legal attributes of an offer.”); *Litton*
 4 *Microwave Cooking Prods.*, 15 F.3d at 794 (“price quotes and catalogs are generally not
 5 offers to form a contract”); *Usemeo, Inc. v. Marbro Co., Inc.*, 60 Md. App. 351, 361 (Md.
 6 Ct. App. 1984) (“a mere quotation or a statement of a price or prices and an invitation to
 7 enter into negotiations, are not offers which may be turned into binding contracts upon
 8 acceptance”); *Master Palletizer Sys., Inc. v. T. S. Ragsdale Co., Inc.*, 725 F. Supp. 1525
 9 (D. Colo. 1989) (“A price quotation or proposal is generally not an offer, but is an
 10 invitation to enter into negotiations or a preliminary solicitation of an offer. [citation]
 11 While price quotations, if detailed enough, can amount to an offer creating the power of
 12 acceptance [citation], the submission of a purchase order by a buyer in response to a price
 13 quotation usually constitutes the offer.”); *Cannavino & Shea, Inc. v. Water Works Supply*
 14 *Corp.*, 361 Mass. 363, 366 (1972) (a letter “was not an offer but a quotation of prices, a
 15 request or suggestion that an offer be made to the defendant”). These authorities show that
 16 there is considerable legal support for the proposition that sales quotes such as Kontron’s
 17 are not sufficiently definite to constitute offers.

18 The second reason that the Kontron Sales Quotes do not qualify as contractual
 19 offers is that they reserve to Kontron the right to ultimately decide whether a contract has
 20 been formed. The Terms and Conditions state that “BUYER shall issue to Kontron firm
 21 Purchase Orders for each purchase required. All Purchase Orders are subject to credit
 22 approval and confirmation of delivery schedule by Kontron prior to acceptance by
 23 Kontron.” However, “[a] manifestation of willingness to enter into a bargain is not an
 24 offer if the person to whom it is addressed knows or has reason to know that the person
 25 making it does not intend to conclude a bargain until he has made a further manifestation
 26 of assent.” Restatement (Second) of Contracts § 26. Kontron’s Sales Quotes did not
 27 enable EI to simply accept and form a contract. Any purchase order tendered still had to
 28 be “accepted” by Kontron. Clauses such as the one in Kontron’s terms and conditions

1 have been found to prevent a document from being considered an offer. *See*
 2 *Technographics, Inc. v. Mercer Corp.*, 777 F. Supp. 1214, 1216 (M.D. Penn. 1991)
 3 (inclusion of a “home office acceptance” clause “converts what would have otherwise been
 4 an offer into a proposal or preliminary negotiation”); *Regent Lighting Corp. v. CMT Corp.*,
 5 1997 U.S. Dist. LEXIS 6190 (M.D.N.C. 1997) (clause stating that “no order shall be
 6 binding on seller until and unless accepted by seller” meant that the document was not an
 7 offer).

8 For these reasons, Kontron’s Sales Quotes are not offers. Rather, EI’s Purchase
 9 Requests are the offers in this case. This is important because Kontron insists that its
 10 onerous Terms and Conditions form part of the contract.⁴ These boilerplate provisions
 11 include a disclaimer of the implied warranties of merchantability and fitness for a
 12 particular purpose and a limited express warranty. These waivers and limitations may
 13 explain how Kontron can contend that it did not breach the agreement despite delivering
 14 non-conforming goods – that is, modules that did not work – for almost a full year. There
 15 is also an attorney’s fees provision that is likely a driving economic force behind this
 16 litigation.

17 If Kontron’s Sales Quotes are not offers, however, then these Terms and Conditions
 18 are not part of the contract. Kontron may contend that the Terms and Conditions were also
 19 included with Kontron’s acceptance (the Invoices) of EI’s Purchase Requests.⁵ At best
 20 then, the Terms and Conditions are additional contract terms in Kontron’s acceptance.
 21 Such terms cannot form part of the contract if they are material alterations. Comm. Code §
 22 2207(b). Warranty disclaimers are material terms and cannot be added by inclusion in
 23 acceptance documents. UCC 2-207 cmt 4 (“Examples of typical clauses which would
 24 normally ‘materially alter’ the contract and so result in surprise or hardship if incorporated
 25

26 ⁴ Kontron will have to prove that Exceptional Innovation received the Terms and
 27 Conditions, which are on purportedly on the “reverse side of the hardcopy” of the Sales
 28 Quotes. However, if the sales quotes sent by fax or email, the reverse side may have never
 been sent.

⁵ In fact, the Invoice do not appear to include the Terms and Conditions but merely
 referred to them and stated that they were available on Kontron’s website.

1 without express awareness by the other party are: a clause negating such standard
2 warranties as that of merchantability or fitness for a particular purpose in circumstances in
3 which either warranty normally attaches”); *Glyptal, Inc. v. Engelhard Corp.*, 801 F. Supp.
4 887, 894 (D. Mass. 1992) (“The case law concerning whether warranty disclaimers are
5 material alterations is more uniform. Courts have held consistently that warranty
6 disclaimers materially alter a contract under section 2-207(2)(b).”). Therefore, Kontron’s
7 Terms and Conditions generally do not form part of the parties’ contract.

8 **VI. Kontron’s Unilateral Price Decrease Does Not Create A New Contract That**
9 **Erases Kontron’s Previous Breaches.**

10 Kontron unilaterally offered a price reduction to EI on or about March 22, 2006. A
11 Kontron account manager wrote in an email that due to a price reduction that Kontron
12 itself received on a constituent part “we will apply the new price of \$883 to your existing
13 orders. Hopefully this will make your day.” [Exhibit 23.] There is no indication that this
14 price reduction required assent to any other terms (for example, Kontron’s boilerplate
15 Terms and Conditions). Kontron appears to find legal significance in this unilateral price
16 reduction – as though it is the equivalent of pressing a contractual reset button, making all
17 of Kontron’s breaches of the original contract irrelevant.

18 However, Kontron’s unilateral price reduction does not alter the terms of the
19 parties’ agreement – certainly not with respect to anything other than price. “While the
20 Commercial Code does not require consideration to modify an agreement (§ 2209), a valid
21 modification still requires proof of the other elements essential to the validity of a contract,
22 including mutual assent.” *PMC, Inc. v. Porthole Yachts*, 65 Cal. App. 4th 882, 887 (1998).
23 Moreover, silence “is insufficient to show assent to a modification.” *Cambridge Techs.,*
24 *Inc. v. Argyle Indus.*, 146 Md. App. 415, 434 (2002). Here, there is no evidence of any
25 assent by EI to any modifications. Moreover, there is nothing to indicate that EI agreed to
26 waive any rights it had as a result of Kontron’s shipments of non-conforming modules.

27 **VII. Prior Negotiations and Settlement Options**

28 Despite its poor performance, EI has paid Kontron approximately \$1.3 million, yet

1 Kontron insists that it is owed an additional \$210,000. On March 26, 2007, EI's CFO
2 responded to Kontron's demand by asking for a price reduction of approximately
3 \$100,000. This reduction was based on the lost profits and lost man hours arising out of
4 the poor performance referenced above. [Exhibit 21.] Kontron responded by briefly
5 offering a \$17,500 reduction before turning the claim over to a collection agency. EI
6 responded by again indicating that it felt the \$100,000 was an appropriate price reduction.
7 [Exhibit 22.] EI also indicated that it wanted to continue to do business with Kontron and
8 would be willing to consider a \$100,000 credit towards the purchase of updated modules.
9 [Exhibit 22.] EI is unaware of Kontron ever responding to this offer of product credits.

10 EI's founder and President Seale Moorer will be present at the ENE and prepared to
11 enter into settlement negotiations. Mr. Moorer is flying cross-country in a good faith
12 attempt to resolve this dispute. However, if significant progress is not made at the
13 Conference, it is unlikely that this case will settle any time in the near future. Put simply,
14 if it is unable to negotiate a settlement with Kontron, EI will likely litigate this case
15 through to its conclusion, and Kontron will incur far more in attorneys' fees than the
16 \$210,000 it seeks to recover. The attorney's fees provision in Kontron's purported
17 contract is most likely unenforceable, thus win or lose Kontron is unlikely to recover any
18 fees. Conversely, if it is enforceable and EI prevails on its claims, the exposure to Kontron
19 will be considerable.

20 Dated: January 11, 2008

RUTAN & TUCKER, LLP
JEFFREY WERTHEIMER

21
22 By: 

23 Jeffrey Wertheimer
24 Attorneys for Plaintiff and Counter-
25 Defendant
26 EXCEPTIONAL INNOVATION, LLC
27
28

Plaintiff Exceptional Innovation's Timeline of Events

DATE	EVENT
Sept. 2004	Seale Moorer of Exceptional Innovation ("EI") is approached by Matthias Huber at a trade show about Kontron's products.
October 2004 to March 2005	Kyle Virgin of EI investigates Kontron's products. These products do not meet Exceptional Innovation's needs.
April 2005	EI determines that Kontron's new, state-of-the-art ETXexpress-PM modules fit their needs, in large part because they have 1 Gigabit Ethernet capability.
April 2005	Kontron delivers a module and baseboard for EI to test; however, the module is a 10/100 module which does not have 1 Gigabit capacity (i.e., it is not a 10/100/1000 module)
May 2005	EI sends its BIOS requirements to Kontron.
May 12, 2005	Sales Quote from Kontron quoting prices for ETXexpress-PM modules and other items.
May 12, 2005	Purchase Request from EI for 1000 ETXexpress-PM modules (as well as other merchandise) requesting delivery of 300 units ASAP with remainder to follow over 12 months. The Request indicates that the date required for delivery is June 1, 2005.
June 2005	Neal Fischer of Kontron tells EI it will be 3 more months for the 1 Gigabit modules.
August 15, 2005	Email from Kyle Virgin of EI to Kontron detailing a list of 4 fixes that Kontron needed to do to the BIOS on the ETXexpress-PM modules. In fact, EI's own engineers spent many hours fixing problems with Kontron's modules.
August 24, 2005	Email from Neal Fischer of Kontron apologizing for "all the trouble getting a fix for you" and indicating that they were shipping out 5 more ETXexpress-PM units that lacked proper fan/heatsinks (which he instructed Exceptional Innovation to fix).
September 2005	Exceptional Innovation attends CEDIA trade show and Kontron's modules fail during show demonstrations.
September 28, 2005	Email from Neal Fischer of Kontron indicating that while Kontron

	engineers have been able to fix certain of the BIOS problems, there are others they are still unable to fix.
October 4, 2005	Emails between Kyle Virgin of EI and Tony Hallett of Kontron expressing frustration at delays.
October 27, 2005	Email from Neal Fisher of Kontron indicating a partial fix for the BIOS problems.
January 17, 2006	Email from Kyle Virgin of EI requesting the shipment of 4 modules.
January 18, 2006	Email from Kyle Virgin complaining "[w]e need to have a discussion as to where you guys are at for shipping us quantity units. We were supposed to have 50 Gig ETXexpress units by end of December 2005 but never received them. Currently we have 1 dev unit. What is the hold-up? We have units to build and have no modules to fill them."
January 19, 2006	Email from Kyle Virgin indicating that 3 of 4 modules shipped were broken and poorly packed by Kontron.
January 24-26, 2006	Emails between Kyle Virgin and various Kontron employees. Virgin expresses concern that only 2 and not 4 modules (as promised) are being shipped; expresses concern he still has not received a promised production schedule of ETXexpress delivery; and other issues.
January 25, 2006	Email from Kyle Virgin about power supply problems with the modules.
January 25, 2006	Email from Kyle Virgin complaining that "I still have not received the promised production schedule of ETXexpress delivery to Exceptional Innovation from anyone at Kontron."
January 26, 2006	Email from Tony Hallett of Kontron committing to the following delivery schedule: 16 modules on February 6, 2006, 36 modules on February 13, 250 modules on March 31, 300 modules on April 13, 376 modules on April 28.
January 27, 2006	Email from Kyle Virgin of EI indicating that the 4th of the original 4 modules Kontron had shipped stopped working. Niels Enevoldsen of Kontron indicates that Kontron tests indicates there are problems and that Kontron has "assembled an engineering team to look into these problems pronto" and will not send more modules until the issues are resolved.
March 31, 2006	Email from Ruth Davis at Kontron indicating that 250 ETXexpress-PM modules scheduled for end of March delivery would be delayed until the end of April.
June 30, 2006	Email from Niels Enevoldsen at Kontron indicating that their investigation on returned circuit boards showed serious problems indicating that

	replacement circuit boards needed to be shipped.
June 26, 2006	Letter from Matthias Huber at Kontron describing flaw identified in ETXexpress-PM modules.
March 16, 2007	Letter from David Freeland of EI outlining Kontron's many performance problems and initial misrepresentations and seeking adjustment of invoiced amounts.,
May 11, 2007	Email from Jerome Rozek of Kontron extending 10% (\$17,500) discount but demanding \$157,533 for payment on Invoice # 413461.
May 30, 2007	Email from David Freeland responding that the offered adjustment was insufficient and detailing the "many problems encountered along the way." He indicates that it should be closer to \$100,000.

JAN-30-2002 11:36A FROM:

TO: 912396436879

P: 3/8



6280 Sequencia Drive San Diego, CA 92121-4371

www.kontron.com email: sales@us.kontron.com

Phone: 800-523-2320 Fax: 858-677-0898

Page # 1
 Quote Date 5/12/2005
 Customer 193271
 Quote # 1011431 SQ
 RFQ

SALES QUOTE

ATTENTION: KYLE VIRGIN
 EXCEPTIONAL INNOVATION
 480 OLDE WORTHINGTON RD.
 SUITE 350
 WESTERVILLE OH 43082
 614 901-8899 Ext. 50207

Quoted By: TONY HALLETT
 Quote Expires: 6/8/2005

INCOTerms:
 EX WORKS SAN DIEGO, CA

Shipping
 Instructions

Terms
 Net 30 Days

Line #	Description	Item Number	UM	Quantity	Price	Extended Price
1.001	ETX-PM 1.0GHZ CELERON-M	18008-0000-10-1	EA	1	656.00	656.00

Preliminary Discount Schedule:

1Pc \$658
 100Pcs \$601
 1000Pcs \$503

2.001	HSP-PM THREADED STAND OFF	18008-0000-99-0	EA	1	17.00	17.00
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Preliminary Discount Schedule:

1Pc \$17
 100Pcs \$18
 1000Pcs \$14

3.000	IC 512 MB DDR SDRAM SODIMM PC2	97007-5120-00-0	EA	1	170.00	170.00
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Preliminary Discount Schedule:

1Pc \$170
 100Pcs \$140
 1000Pcs \$125

Sales Tax
 Quote Total 843.00

All pricing is in U.S. Dollars.

- Price includes a two-year factory warranty.
- Above products may be subject to export control for certain destinations.
- Lifetime technical support is included for all standard products.
- Kontron can provide Custom Chassis, Data Acquisition Boards, and Special Testing Services. Contact your sales engineer for a QUOTE.
- Kontron is an Authorized Intel Certified Dealer.
- The prices and terms on this quotation are NOT subject to verbal changes or other agreements unless approved in writing by Kontron. All quotations and agreements are contingent upon acts of God, availability of materials and all other causes beyond our control.

JAN-30-2002 11:37A FROM:

TO: 912396436879

P: 4/8



6260 Sequence Drive San Diego, CA 92121-4371
 www.kontron.com email: sales@us.kontron.com
 Phone: 800-523-2320 Fax: 858-677-0898

Page # 2
 Quote Date 5/12/2005
 Customer 193271
 Quote # 1011431 SQ
 RFQ

SALES QUOTE

ATTENTION: KYLE VIRGIN
 EXCEPTIONAL INNOVATION
 480 OLDE WORTHINGTON RD.
 SUITE 350
 WESTERVILLE OH 43082
 614 901-8899 Ext. 50207

Quoted By: TONY HALLETT
 Quote Expires: 6/8/2005

INCOTERMS:
 EX WORKS SAN DIEGO, CA

Shipping
 Instructions

Terms
 Net 30 Days

Line #	Description	Item Number	UM	Quantity	Price	Extended Price
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- Prices are based upon costs and conditions existing on the date of quotation and are subject to change by Kontron before final acceptance.
- Typographical and stenographic error are subject to correction.
- Conditions not specifically stated herein shall be governed by established trade customs. Terms inconsistent with those stated herein, which may appear on Purchaser's formal order, will NOT be binding on Kontron.
- Change orders that are initiated by the customer that cause the system to be de-integrated will be assessed a charge of \$100.00 per system.
- Change Orders or Cancellations on special order products may be assessed additional charges, such as additional NRE fees or a cancellation fee.
- Terms and Conditions are printed on the reverse side of the hard copy quote. Terms and Conditions may also be found on our web site.

JAN-30-2002 11:37A FROM:

TO: 912396436879

P: 7/8



6260 Sequence Drive San Diego, CA 92121-4371
 www.kontron.com email: sales@us.kontron.com
 Phone: 800-523-2320 Fax: 858-677-0898

Page # 1
 Quote Date 5/12/2005
 Customer 193271
 Quote # 1011422 SQ
 RFQ

SALES QUOTE

ATTENTION: KYLE VIRGIN
 EXCEPTIONAL INNOVATION
 480 OLDE WORTHINGTON RD.
 SUITE 350
 WESTERVILLE OH 43082
 614 901-8899 Ext. 50207

Quoted By: TONY HALLETT
 Quote Expires: 6/11/2005

INCOTerms:
 EX WORKS SAN DIEGO, CA

Shipping
 Instructions

Terms
 Net 30 Days

Line #	Description	Item Number	UM	Quantity	Price	Extended Price
1.000	ETXexpress-PM Module 760-2GHz	38001-0000-20-2	EA	1	1,175.00	1,175.00
Discount Schedule:						
1Pcs \$1175						
100Pcs \$1068						
1000Pcs \$881						
2.001	512MB DDR2-DIMM	97011-5120-00-0	EA	1	170.00	170.00
Discount Schedule:						
1Pc \$170						
100Pcs \$140						
1000Pcs \$125						
3.001	1024MB DDR2-DIMM	97011-1024-00-0	EA	1	195.00	195.00
Discount Schedule:						
1Pc \$185						
100Pcs \$163						
1000Pcs \$156						
4.000	ETX-Express Heatspreader	38001-0000-99-2	EA	1	18.00	18.00
Preliminary Discount Schedule:						
1Pc \$18						
100Pcs \$17						
1000Pcs \$16						

Sales Tax
 Quote Total 1,558.00

All pricing is in U.S. Dollars.

JAN-30-2002 11:37A FROM:

TO: 912396436879

P: 8/8



8280 Sequencia Drive San Diego, CA 92121-4371
 www.kontron.com email: sales@us.kontron.com
 Phone: 800-523-2320 Fax: 858-677-0898

Page # 2
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 Customer 193271
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 EX WORKS SAN DIEGO, CA

Shipping
 Instructions

Terms
 Net 30 Days

Line #	Description	Item Number	UM	Quantity	Price	Extended Price
--------	-------------	-------------	----	----------	-------	----------------

- Price includes a two-year factory warranty.
- Above products may be subject to export control for certain destinations.
- Lifetime technical support is included for all standard products.
- Kontron can provide Custom Chassis, Data Acquisition Boards, and Special Testing Services. Contact your sales engineer for a QUOTE.
- Kontron is an Authorized Intel Certified Dealer.
- The prices and terms on this quotation are NOT subject to verbal changes or other agreements unless approved in writing by Kontron. All quotations and agreements are contingent upon acts of God, availability of materials and all other causes beyond our control.
- Prices are based upon costs and conditions existing on the date of quotation and are subject to change by Kontron before final acceptance.
- Typographical and stenographic error are subject to correction.
- Conditions not specifically stated herein shall be governed by established trade customs. Terms inconsistent with those stated herein, which may appear on Purchaser's formal order, will NOT be binding on Kontron.
- Change orders that are initiated by the customer that cause the system to be de-integrated will be assessed a charge of \$100.00 per system.
- Change Orders or Cancellations on special order products may be assessed additional charges, such as additional NRE fees or a cancellation fee.
- Terms and Conditions are printed on the reverse side of the hard copy quote. Terms and Conditions may also be found on our web site.



KONTRON AMERICA, INCORPORATED

TERMS AND CONDITIONS OF SALES

1. **Scope.** The following terms and conditions ("Agreement") apply to the sale of all Products manufactured or distributed by Kontron America, Incorporated, a Delaware corporation, including its affiliates ("Kontron"), to the undersigned BUYER (the "Products").

2. **Purchase Orders.** BUYER shall issue to Kontron firm Purchase Orders for each purchase required. All Purchase Orders are subject to credit approval and confirmation of delivery schedule by Kontron prior to acceptance by Kontron and may require credit enhancement, such as advanced payment, letter of credit or other guarantee, prior to acceptance. Kontron's acceptance of a purchase order shall only occur upon delivery to BUYER of a written acceptance executed by Kontron's duly authorized representative. In the event of any conflict between this Agreement and any Purchase Order or other document, the terms of this Agreement shall prevail.

3. **Prices.** The prices for Products are set forth in Kontron's quotation which can be changed at any time upon prior written notice to BUYER. The quoted prices are exclusive of all taxes, freight, duties, and other applicable charges which shall be paid by BUYER. Any taxes, duties, fees, charges or assessments of any nature levied by any governmental authority in connection with any transaction under this Agreement, whether levied against BUYER, against Kontron or its employees, or against any of Kontron's subcontractors or their employees, shall be the responsibility of BUYER and shall be paid directly by BUYER to the governmental authority concerned. If Kontron or its subcontractors, or the employees of either, are required to pay any such levies, fines, penalties, or assessments, then BUYER shall reimburse such payor promptly upon submission of the applicable document.

4. **Changes.** Within thirty (30) days of receipt from BUYER of a request for changes within the general scope of work under an accepted purchase order, Kontron shall respond in writing stating the consequences of such requested change. If such requested change causes an increase or decrease in the cost of the Products and/or the time required for performance, an equitable adjustment reasonably determined by Kontron shall be made in the price and/or the time required for performance. Such price adjustment may include but not be limited to any rework charges associated with the requested change. Kontron shall have the right in its sole discretion to accept or reject any such requested changes and shall not be required to proceed with the change unless the parties have mutually agreed in writing. All approved change orders shall be considered amendments to the applicable purchase order. If a requested change is not accepted by Kontron, the original purchase order shall remain in effect.

5. **Payments.**

(a) **Open Account.** Upon Kontron's approval of BUYER's credit, if no credit enhancement is required, all payments shall be made in United States Dollars, net thirty (30) days from date of invoice. All payments received after thirty (30) days shall accrue interest at the rate equal to the lesser of one percent (1.5%) per month or the maximum legally permissible rate.

(b) **Letter of Credit.** All payments shall be made in United States Dollars and pursuant to an irrevocable Letter of Credit issued by a bank approved by Kontron with conditions acceptable to Kontron. The Letter of Credit shall be established at BUYER's sole expense and BUYER shall be solely responsible for all charges and fees associated with the Letter of Credit, including without limitation all fees for the electronic transfer of funds. Each Letter of Credit shall cover the full amount of the relevant purchase order or contract (and any transportation or other expenses that Kontron has previously agreed to prepay on BUYER's behalf). Kontron shall have the right to require amendments to the Letter of Credit prior to releasing Products under any purchase order submitted. Open account terms will be considered by Kontron, in Kontron's sole discretion, if BUYER possesses a first-class standing in the operating country and can demonstrate favorable trade arrangements with other U.S. suppliers. BUYER agrees, upon request, to provide Kontron with financial information acceptable to Kontron to assist Kontron in determining from time to time the credit terms, if any, that Kontron may extend to BUYER. Kontron reserves the right to revoke open account terms at any time based on unsatisfactory payment performance or credit risk in Kontron's sole discretion, in which event BUYER agrees to provide a Letter of Credit or such other credit enhancement as may be required by Kontron.

6. **Transportation.** All sales and deliveries of Products shall be "FCA Kontron's authorized shipping point" as defined in Incoterms 1990, as amended. BUYER is responsible for all transportation, insurance, duties and

other applicable expenses. These expenses shall be paid by BUYER and shall be added to Kontron's invoice to BUYER if prepaid by Kontron.

7. **Title and Risk of Loss.** Title to the Products shall pass to BUYER upon delivery of the Products to a common carrier. BUYER hereby grants Kontron a security interest in the Products until the invoice covering the Products has been paid in full. BUYER also irrevocably appoints Kontron as its lawful attorney-in-fact coupled with an interest with full authority to execute and file UCC-1's and any other necessary documents to perfect and enforce its security interest. Kontron shall bear the risk of loss or damage until the Products are delivered to a common carrier. Upon delivery to a common carrier, BUYER shall bear the entire risk of loss and shall be liable for all loss or damage to the Products.

8. **Inspection.** Unless BUYER notifies Kontron in writing within thirty (30) days from date of shipment of any Products that said Products are rejected, they will be deemed to have been accepted by BUYER. In order for the notice of rejection to be effective, BUYER must also specify in detail the reason(s) why the Products are being rejected. BUYER shall only have the right to reject Product for "defects," as defined in Section 10 below.

9. **Force Majeure.** Kontron shall not be liable for any failure to perform or other loss due to unforeseen circumstances or causes beyond its control, including without limitation acts of God, strikes, material and/or transportation shortages, natural casualties, governmental regulations, war, fire, flood, disasters and civil unrest.

10. **Warranty.** Kontron agrees to repair or replace Products that fail due to a defect within twelve (24) months after the shipment date of each Product unit to BUYER ("Warranty Period"). For purposes of this Agreement the term "defect" shall mean the Product fails to operate or fails to conform to its specifications agreed to in writing by Kontron. Any claim made pursuant to this Agreement shall be asserted or made in writing only by BUYER, not any of BUYER's customers or end users. BUYER shall comply with Kontron's Standard Return Materials Authorization ("RMA") procedure for all warranty claims as set forth in Kontron's operation manual. This limited warranty only covers repairs at Kontron's facilities and does not include labor, transportation or other expenses to repair or reinstall warranted Products on site or at BUYER's premises.

Kontron reserves the right to investigate any warranty claims to quickly resolve the problem or to determine whether such claims are proper. In the event that after repeated efforts Kontron is unable to repair or replace a defective Product, then BUYER's exclusive remedy and Kontron's entire liability in contract, tort or otherwise shall be the payment by Kontron of BUYER's actual damages after mitigation, but shall not exceed the purchase price, tax, freight and insurance actually paid by BUYER for the defective Product.

This limited warranty shall not apply to any Product, or parts thereof, that (a) has had the Serial Number, Model Number, or other identification markings altered, removed or rendered illegible; (b) has been damaged by or subject to improper installation or operation, misuse, accident, neglect and/or has been used in any way other than in strict compliance with Kontron's operation and installation manual; (c) has become defective or inoperative due to its integration or assembly with any equipment or products not supplied by Kontron; (d) has been repaired, modified or otherwise altered by anyone other than Kontron, and/or has been subject to the opening of any sealed cabinet boxes or covers without Kontron's prior written consent. If any warranty claim by BUYER falls within any of the foregoing exceptions, BUYER shall pay Kontron its then current rates and charges for such services.

THE ABOVE WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION THOSE OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF THIRD-PARTY RIGHTS, ALL OF WHICH ARE EXPRESSLY DISCLAIMED. PLEASE REFER TO THE WARRANTY POLICY AND PROCEDURES CONTAINED IN Kontron'S OPERATION AND INSTALLATION MANUAL.

11. **Confidentiality.** Many aspects of the design, production and operation of the Products, in any form, are proprietary information and trade secrets of Kontron ("Proprietary Rights"), and such Proprietary Rights shall not be disclosed or otherwise transferred by BUYER or BUYER's employees to any other person or entity at any time. BUYER shall not modify, reverse engineer, improve or otherwise change any Product or parts thereof, or any



of Kontron's Proprietary Rights related thereto, and shall not use, appropriate or copy any of Kontron's Proprietary Rights, either for itself or for others. BUYER also agrees not to incorporate or in any way use any of Kontron's Proprietary Rights or confidential information (disclosed separately or embodied in any of the Products) in its or any other party's products or businesses.

12. Property Rights. Kontron shall solely own and have exclusive worldwide right, title and interest in and to all United States and foreign patents, trademarks, service marks, copyrights, mask works, trade secrets, and all other intellectual and industrial property rights in any way related to the Products, to Kontron's Proprietary Rights, and to all modifications, improvements and derivative works related thereto. Title to all of Kontron's Proprietary Rights embodied in the Products shall always remain with Kontron, and BUYER's use thereof shall be restricted under a non-exclusive license granted by Kontron. Subject to BUYER's performance of all obligations hereunder, Kontron hereby grants to BUYER a personal, non-exclusive, non-transferable and indivisible license to use Kontron's Proprietary Rights only as they are embodied in the Products and for no other purpose. BUYER shall not remove Kontron trademark notices, copyright notices, patent markings or mask work notices on or in the Products or on any other materials supplied by Kontron. Paragraphs 11 and 12 shall survive the termination of this Agreement, and shall be specifically enforceable by injunctive and other relief against BUYER in the event of BUYER's breach since both parties agree that Kontron will be irreparably harmed and money damages would be inadequate compensation to Kontron for BUYER's breach. In the event of such breach, Kontron shall be entitled to injunctive relief against BUYER in addition to any other remedies to which it is entitled.

13. Limitation of Liability. KONTRON SHALL NOT BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL OR EXEMPLARY DAMAGES SUFFERED BY BUYER AND/OR ANY END USER RELATED TO OR ARISING OUT OF THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED HEREBY AND/OR THE USE OR INABILITY TO USE THE PRODUCTS, INTEGRATION OF THE PRODUCTS WITH EQUIPMENT NOT PROVIDED BY KONTRON, LOSS OF GOODWILL OR PROFITS AND/OR FROM ANY OTHER CAUSE WHATSOEVER, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT WILL KONTRON'S LIABILITY FOR ANY CAUSE OF ACTION RELATING TO THIS AGREEMENT EXCEED AMOUNTS RECEIVED BY KONTRON FROM BUYER FOR THE PRODUCT OR SERVICE THAT IS THE SUBJECT OF SUCH CLAIM OR DISPUTE. KONTRON AND BUYER FURTHER AGREE THAT EACH AND EVERY PROVISION OF THIS AGREEMENT WHICH PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES OR EXCLUSION OF DAMAGES IS EXPRESSLY INTENDED TO BE SEVERABLE AND INDEPENDENT OF ANY OTHER PROVISION SINCE THOSE PROVISIONS REPRESENT SEPARATE ELEMENTS OF RISK ALLOCATION BETWEEN THE PARTIES, AND SHALL BE SEPARATELY ENFORCED. BOTH PARTIES ALSO AGREE THAT THE PRICE OF THE PRODUCTS REFLECTS THE ALLOCATION OF RISK, WARRANTY AND LIMITATION OF LIABILITY PROVISIONS HEREIN.

14. Waiver. Kontron shall not be deemed to waive any default of any provision of this Agreement unless Kontron signs a written waiver.

15. Indemnity. BUYER shall indemnify, defend and hold Kontron harmless from all claims, damages, expenses, liabilities and losses, including without limitation attorney's fees and costs incurred that in any way arise out of or relate to (a) the manner in which BUYER and/or any of its customers or end users use or operate the Products; (b) any personal injuries, property damages or other losses resulting or occurring from the willful or negligent acts or omissions of BUYER, its customers or end users; (c) defects or other problems with other component parts, equipment or materials produced or supplied by anyone other than Kontron and that may be used with the Products; and/or (d) BUYER's transactions with its customers, end users or other parties regarding the Products.

16. Termination. BUYER shall not terminate or cancel any order, or portion thereof, after it is given to Kontron without Kontron's prior written consent in its sole discretion and subject to the condition that BUYER pays to Kontron the sum of (1) the price of all Products previously delivered to BUYER, (2) Kontron's actual costs incurred as a result of such termination (e.g., purchase of raw materials and other obligations), which Kontron will attempt to keep as low as possible, and (3) a cancellation fee of twenty percent (20%) of such actual costs.

17. Attorney's Fees. In the event a dispute arises regarding this Agreement or the Products, the prevailing party shall be entitled to recover from the unsuccessful party actual attorney's fees and costs incurred.

18. Entire Agreement. BUYER agrees to all of the provisions of this Agreement by signing below and/or by submitting its purchase order for the Products. This Agreement is the sole and entire agreement between the parties (except for the price or the shipment schedule for the Products contained in Kontron's quotation or BUYER's purchase order accepted by Kontron which shall be incorporated herein subject to the terms hereof) and shall supersede all prior or contemporaneous written or oral understandings, representations or communications and/or other terms in any purchase order or other document, now or hereafter delivered. The provisions of this Agreement shall apply to any and all purchase orders or requests for Products submitted by BUYER to Kontron at any time in the future after executing this Agreement, without the need for either party to re-execute this Agreement. No modification of this Agreement shall be valid unless in writing and signed by an authorized representative of Kontron.

19. Governing Law and Venue. This Agreement shall be construed and enforced according to the laws of the State of California regarding contracts made and wholly performed in California. Kontron and BUYER irrevocably submit to the jurisdiction of the state and/or federal courts in San Diego County, California for any action or proceeding regarding this Agreement.

20. Export. BUYER shall not directly or indirectly export, transfer or in any way distribute any of the Products, or parts thereof, or any of Kontron's Proprietary Rights or technical data to any country or territory that is prohibited from receiving such materials under any applicable law of the United States. BUYER shall comply with all applicable laws and regulations, including, without limitation, all of the laws and regulations of any applicable agency of the United States government responsible for the administration of the United States export control laws and regulations and the United States Foreign Corrupt Practices Act of 1977, as amended. BUYER shall also be responsible for obtaining all export licenses or other approvals required to export or re-export the Products outside the United States. BUYER further indemnifies, defends and holds Kontron harmless from all damages, claims, expenses, liabilities and losses including without limitation attorney's fees and costs that in any way arise out of or relate to BUYER's breach of this warranty and/or failure to comply with the provisions of this Section 20. Kontron shall not be liable in the event any authorization of any governmental authority is delayed, denied, revoked, restricted and not renewed, and BUYER shall not be relieved thereby of its obligations to pay Kontron for its Products or any other charges which are the obligations of BUYER under this Agreement.

22. Integration of Equipment. Kontron shall not be liable for any problems, damages or costs associated with the integration, installation or incorporation of the Products with equipment or materials not provided by Kontron.

23. Authority. The persons executing this Agreement on behalf of Kontron and BUYER warrant and represent that they have been authorized by their respective board of directors or other governing bodies to enter into this Agreement and to bind their respective companies to all of the provisions of this Agreement.

24. Survival. All of the provisions of Section 11, 12, 13, 15 and 20 of this Agreement shall survive the termination or expiration of this Agreement.

25. Assignment. BUYER shall not assign, transfer or otherwise encumber this Agreement or any part thereof without Kontron's prior written consent.

26. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be void, invalid or unenforceable, the remaining provisions shall remain in full force and effect.

Any changes or deviations to the above Terms & Conditions of Sale must be mutually agreed to by both Parties in written form



Purchase Request

Reference Number: JLH051305A	Priority: High	Date Requested: 5/12/2005
Charge To: Exceptional Innovation	Date Required: 6/1/2005	
Submitted By		
Name: Kyle Virgin	Address Line 1: 480 Olde Worthington Rd.	
Department: Engineering	Address Line 2: Suite 350	
E-mail Address: kvirgin@exceptionalinnovation.com	City: Westerville	
Telephone Number: 614-901-8899 x50207	State/Province: Ohio	Postal Code: 43082
	Country/Region: USA	

Suggested Supplier Information

Company Name: Kontron	Telephone Number: 800-523-2320
Web Site Address: www.kontron.com	Fax Number: 858-677-0898

Shipping Information

<input checked="" type="checkbox"/> Allow Partial Shipment	Ship Method: Two-day air
<input checked="" type="checkbox"/> Ship to Address Listed Above	

Itemized List

Currency: USD (\$)

Summary:

EI Controller

Item Number	Description					Total with Tax (\$)
	Part Number	Quantity	Unit Price (\$)	Tax (%)	Pre-Tax Price (\$)	
1	ETX-PM 1.0GHz Celeron-M					503,000.00
		1,000	503.00	0.000	503,000.00	
2	IC 512MB DDR SDRAM SODIMM PC2					125,000.00
		1,000	125.00	0.000	125,000.00	
3	HSP-PM Threaded Stand Off					

Case 2:07-cv-00724-EAS-MRA Document 7-3 Filed 08/03/2007 Page 2 of 4

		1,000	14.00	0.000	14,000.00	14,000.00
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Subtotal (\$)	642,000.00
Tax (\$)	0.00
Shipping/Handling Cost (\$)	0.00
Total (\$)	642,000.00

Notes

Attn: Tony Hallett - 300 units requested ASAP. The rest to follow within next 12 months based upon demand. Reference Sales Quote#1011431SQ. Quote date 5/12/2005 Customer#193271

Signatures

Sign and print your name.

Kyle Virgin Kyle Virgin 5-12-2005
Employee Signature Date

Quarrie Heffner 5-13-05
Approval Signature Date
for Duke Moore

**Exceptional
Innovation**

Purchase Request

Reference Number: JLH051305B	Priority: High	Date Requested: 5/12/2005
Charge To: Exceptional Innovation	Date Required: 6/15/2005	
Submitted By		
Name: Kyle Virgin	Address Line 1: 480 Olde Worthington Rd.	
Department: Engineering	Address Line 2: Suite 350	
E-mail Address: kvirgin@exceptionalinnovation.com	City: Westerville	
Telephone Number: 614-901-8899 x50207	State/Province: Ohio	Postal Code: 43082
	Country/Region: USA	

Suggested Supplier Information

Company Name: Kontron	Telephone Number: 800-523-2320
Web Site Address: www.kontron.com	Fax Number: 858-677-0898

Shipping Information

☒ Allow Partial Shipment Ship Method:
☒ Ship to Address Listed Above **Two-day air**

Itemized List

Currency: USD (\$)

Summary:

PI WALLPANEL/SET-TO-BOX

Item Number	Description					Total with Tax (\$)
	Part Number	Quantity	Unit Price (\$)	Tax (%)	Pre-Tax Price (\$)	
1	ETXexpress-PM Module 780-2GHz					
		1,000	881.00	0.000	881,000.00	881,000.00
2	1024MB DDR2-DDMM					
		1,000	156.00	0.000	156,000.00	156,000.00
3	ETX-Express Heatspreader					

		1,000	15.00	0.000	15,000.00	15,000.00
--	--	-------	-------	-------	-----------	-----------

Subtotal (\$)	1,053,000.00
Tax (\$)	0.00
Shipping/Handling Cost (\$)	0.00
Total (\$)	1,053,000.00

Notes

Attn: Tony Hallett - 300 units requested ASAP. The rest to follow within next 12 months based upon demand. Reference Sales Quote #1011422SQ. Quote date 5/12/2005 Customer #193271

Signatures

Sign and print your name.

Kyle Virgin Kyle Virgin
Employee Signature

5-12-2005
Date

Francis Haffner
Approval Signature *per Dale Morris*

5-13-05
Date

Case 2:07-cv-00724-EAS-MRA Document 7-4 Filed 08/03/2007 Page 1 of 3



Kontron America, Inc.
 Dept 9073
 Los Angeles CA 90084-9073
 Wire Info: ABA# 121000248
 Acct# 4050004407 Wells Fargo, N.a. San Francisco, CA
 Ph: 858-877-0877 Fax: 858-877-0895
 EIN# 33-0498455 www.kontron.com

Page # 1
 Invoice Date 11/30/06
 Customer 63515
 Order # 343657 SO
 Invoice # 412481 RI
 PO # JLH051305B REL 4

INVOICE

SOLD TO:

EXCEPTIONAL INNOVATIONS
 480 OLDE WORTHINGTON RD. #350
 WESTERVILLE OH 43082

SHIP TO:

EXCEPTIONAL INNOVATIONS
 480 OLDE WORTHINGTON RD. #350
 WESTERVILLE OH 43082

INCOTerms:		Shipping	GROUND	Terms		Net 60 Days
EX WORKS POWAY, CA		Instructions	DNSB DNI	Net Due Date		01/29/07
Ln/Rq Dt	Description	Item Number	UM	Quantity	Price	Extended Price
KYLE VIRGIN 614-901-8888 XT. 50207						
*** SPECIAL SHIPPING INSTRUCTIONS ONLINE ***						
QOBA REQUIRED - CONTACT TZMB BEFORE SHIP CONFIRM						
1.001	ETXE-PM-780 EXCEPTIONAL INNOV	380021024200EX2	EA	99	883.00	87,417.00
NON STANDARD PRODUCT 30 DAY RETURN POLICY DOES NOT APPLY						
2.001	ETXE-PM-780 (CU EXCEPT IN	380021024200EX3	EA	99	883.00	87,417.00
5.000	Freight	MACH 1 GROUND	EA	1	225.00	225.00
6.000	Text Line	TRKG# SAN 2043680				
					Subtotal:	175,059.00
..... Tax Group Summary						
OHNON		%	174,834.00			

Tax Rate 0 %

Sales Tax

Invoice Total

175,059.00

See Terms and Conditions on web site.

EXHIBIT 4, PAGE 26

Case 2:07-cv-00724-EAS-MRA Document 7-4 Filed 08/03/2007 Page 2 of 3



Kontron America, Inc.
 Dept 9073
 Los Angeles CA 90084-9073
 Wire Info: ABA# 121000248
 Acct# 4050004407 Wells Fargo, N.a. San Francisco, CA
 Ph: 858-677-0877 Fax: 858-677-0895
 EIN# 33-0498455 www.kontron.com

Page # 1
 Invoice Date 12/27/08
 Customer 63515
 Order # 343659 SO
 Invoice # 413693 RI
 PO # JLH051305B REL 8

INVOICE

SOLD TO:

EXCEPTIONAL INNOVATIONS
 480 OLDE WORTHINGTON RD. #350
 WESTERVILLE OH 43082

SHIP TO:

EXCEPTIONAL INNOVATIONS
 480 OLDE WORTHINGTON RD. #350
 WESTERVILLE OH 43082

INCOTerms:		Shipping	GROUND	Terms		Net 60 Days	
EX WORKS POWAY, CA		Instructions	DNSB DNI	Net Due Date		02/25/07	
Ln/Rq Dt	Description	Item Number	UM	Quantity	Price	Extended Price	
KYLE VIRGIN 614-901-8889 XT. 18343							

*** PARTIAL OK PER GARY SHULL							
*** SPECIAL SHIPPING INSTRUCTIONS ONLINE							

1.000	ETXE-PM-780 EXCEPTIONAL INNOV	380021024200EX2	EA	20	883.00	17,660.00	
NON STANDARD PRODUCT 30 DAY RETURN POLICY DOES NOT APPLY							
2.000	ETXE-PM-780 (CU EXCEPT IN	380021024200EX3	EA	18	883.00	15,894.00	
3.000	Freight	UPS GROUND COLLECT	EA	1	.00		
4.000	Text Line	128157220300299500					
						Subtotal:	33,554.00
..... Tax Group Summary							
OHNON		%	33,554.00				

Tax Rate 0 %

Sales Tax

Invoice Total

33,554.00

See Terms and Conditions on web site.

EXHIBIT 4, PAGE 27

Case 2:07-cv-00724-EAS-MRA Document 7-4 Filed 08/03/2007 Page 3 of 3



Kontron America, Inc.
 Dept 9073
 Los Angeles CA 90084-9073
 Wire Info: ABA# 121000248
 Acct# 4050004407 Wells Fargo, N.A. San Francisco, CA
 Ph: 858-677-0877 Fax: 858-677-0895
 EIN# 33-0498455 www.kontron.com

Page # 1
 Invoice Date 01/18/07
 Customer 63515
 Order # 343659 SO
 Invoice # 414627 RI
 PO # JLH051305B REL 8

INVOICE

SOLD TO:

EXCEPTIONAL INNOVATIONS
 480 OLDE WORTHINGTON RD. #350
 WESTERVILLE OH 43082

SHIP TO:

EXCEPTIONAL INNOVATIONS
 480 OLDE WORTHINGTON RD. #350
 WESTERVILLE OH 43082

INCOTERMS:		Shipping	GROUND	Terms		Net 60 Days
EX WORKS POWAY, CA		Instructions	DNSB DNI	Net Due Date		03/18/07
Ln/Rq Dt	Description	Item Number	UM	Quantity	Price	Extended Price
KYLE VIRGIN 614-901-8899 XT. 18343						
*** PARTIAL OK PER GARY SHULL						
*** SPECIAL SHIPPING INSTRUCTIONS ONLINE						
2.001	ETXE-PM-760 (CU EXCEPT IN	380021024200EX3	EA	2	883.00	1,766.00
5.000	Freight	UPS GROUND COLLECT	EA	1	.00	
6.000	Text Line	1ZB157220300303085				
Subtotal:						1,766.00
..... Tax Group Summary						
OHNON		%	1,766.00			

Tax Rate 0 %

Sales Tax

Invoice Total

1,766.00

See Terms and Conditions on web site.

EXHIBIT 4, PAGE 28

Kyle Virgin

REDACTED

From: Kyle Virgin
Sent: Monday, August 15, 2005 2:14 PM
To: Adis Galesic
Cc: Neal Fischer; Tim McMahon
Subject: RE: Panels and ETXexpress BIOS...

Neal,

I will call you to discuss these issues...

I re-flashed the BIOS with the file that Adis created back in May and all displays work. This means there is an issue with the custom BIOS Raj created for us. Adis suggested that he may have selected the wrong timing for the 12.1". This needs fixed ASAP and a new file needs emailed to me ASAP. Below is a list of fixes that Kontron needs to do the BIOS globally.

1. After flashing to the custom BIOS the USB keyboard will let me hit F1 to run BIOS setup but once in BIOS the keyboard goes dead. This happens on the Laredo.
2. Once the BIOS clock/date has been set on our baseboard, upon boot using a USB keyboard, if I want to go into the BIOS by pressing the delete key, I get a black screen and the system hangs there infinitely.
3. I have to physically remove the hard drive from the board to force the system to boot with a USB floppy drive. The BIOS detects the USB floppy drive. I put it first in the boot list and disabled the hard drive and the system still boots to the hard drive that's why I had to remove it physically.
4. I want to change the video setting back to "BOTH" for LVDS and RGB.

All these issues need resolved ASAP. We are getting ready to assemble units tomorrow for our trade show so this has to be resolved.

Thank You
-Kyle

From: Adis Galesic [mailto:adis.galesic@us.kontron.com]
Sent: Monday, August 15, 2005 1:14 PM
To: Kyle Virgin
Subject: FW: Panels and ETXexpress BIOS...

Kyle,

Here is BIOS I have sent to you in May, as you have requested.

Regards,

EXHIBIT 5, PAGE 29

1/2/2008

Adis

From: Adis Galesic
Sent: Friday, May 27, 2005 12:17 PM
To: 'Kyle Virgin'
Cc: Stefan Milnor; Rajinikanth Pandurangan
Subject: RE: Panels and ETXexpress BIOS...

Hi Kyle,

Please find attached evaluation version of the ETX-ExpressPM BIOS.
Your flat panel settings are included in video BIOS.
To flash this BIOS please unzip attached file to DOS bootable disk and type on command line as follows:

AFUDOS /iexpir001.rom /pbn

To select you flat panels please select following FLAT PANEL TYPES:

1024x600 -> flat panel type 10
1280x768 -> flat panel type 8
1280x800 -> flat panel type 14

To enable flat panel LVDS interface please select CRT & LFP display device.

Regards,
Adis

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Thursday, May 26, 2005 7:13 AM
To: Adis Galesic
Subject: Panels and ETXexpress BIOS...

Adis,

I hear you are going on vacation for 2 weeks starting tomorrow. What is the status on our panels and sending me a BIOS file? Can we get this by tomorrow?

Thank You,

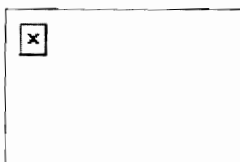
Kyle Virgin
kvirgin@exceptionalinnovation.com

Hardware Design Engineering
Exceptional Innovation
480 Olde Worthington Road
Suite 350
Westerville, Ohio 43082
Phone: (614) 901-8899 x50207
Fax: (614) 901-8896

<http://www.exceptionalinnovation.com>

EXHIBIT 5, PAGE 30

1/2/2008



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EXHIBIT 5, PAGE 31

Kyle Virgin

REDACTED

From: Neal Fischer [mailto:neal.fischer@us.kontron.com]
Sent: Tuesday, August 23, 2005 2:53 AM
To: Kyle Virgin
Cc: Adis Galesic
Subject: New ETXexpress-PM BIOS (EXPIR005_small_adm.zip)
Importance: High

Kyle,

Our San Diego engineers have been hard at work on the Exceptional Innovation BIOS. In the
 * The Good News *

- When the board is started the first time

- . You can use F1 button to go into the CMOS settings

- . The USB keyboard is working fine and it is possible to set the time and date

* The Bad News *

- However if the time and date are saved it is not possible to get into the CMOS settings

- the DEL key because the flat panel goes black and the keyboard is stuck.

Also Note:

- The Flat Panel timing is fine

- The system boots to XP with no problem

* Late Breaking Note *

One of the BIOS engineers mentioned about the * Bad News * item above the following:

"Neal, concerning using the DEL key, I noticed it appears to be a matter of timing.

The method I use is this: (1) Wait until the logo appears on the screen. (2) Watch the keyboard lights and wait for them to flash on then off. (3) Wait about 1 second then press DEL once. I believe you can then go into the setup ok. I believe it has to do with USB initialization/device detection. The system should not lock, I definitely need to find a fix for this."

If you have any questions about the above information or the attached file please let me know.

Regards,

Neal Fischer

EXHIBIT 6, PAGE 32

1/2/2008

Kyle Virgin

REDACTED

From: Neal Fischer [mailto:neal.fischer@us.kontron.com]
Sent: Wednesday, August 24, 2005 8:41 PM
To: Kyle Virgin
Cc: Adis Galesic
Subject: Qty. 5 ETXexpress-PM 2.0GHz with 1GB DDR2 SDRAM shipped today

Kyle,

First let me say we apologize for all the trouble in getting a fix for you and Exceptional Innovation. Our intention is not to prolong your agony prior to the CEDIA show.

I just shipped out qty. 5 of the ETXexpress-PM 2.0GHz modules with 1GB DDR2 SDRAM. These units are all 700-172 Rev. AX.5 and contain the 005 EI BIOS and CPLD 2.5.

I was not able to get the HSP+Fan/Heatsinks ready for these units so you will need to unscrew the 7 screws from each the 5 "Bad" units and reattach them on the new units. This takes about 3 minutes for each unit. As you detach the HSP note that the Thermal stack comes off also, sometimes it sticks to the Plano components.

If you have any questions about this please let me know.

Sincerely,
Neal Fischer

	
Neal Fischer Project Manager Modules EPC neal.fischer@kontron.com	Kontron America 3178 Laurelview Court Fremont, CA 94538 Tel: 800.995.7560 (main) 510.438-7360 (direct) Cell: 408.888.1150 Fax: 510.490.2360 www.kontron.com

EXHIBIT 7, PAGE 33

Kyle Virgin

REDACTED

From: Neal Fischer [mailto:neal.fischer@us.kontron.com]
Sent: Wednesday, September 28, 2005 6:50 PM
To: Tony Hallett
Cc: Kyle Virgin; Jerome Rozek
Subject: RE: ETX Express - GigE Testing

Tony,

Adis made some progress with the latest EI custom BIOS release (011). There are some issues. I don't have the details yet, but Adis is working closely with the BIOS team now.

- Neal

From: Tony Hallett
Sent: Wednesday, September 28, 2005 2:47 PM
To: Neal Fischer
Cc: 'Kyle Virgin'; Jerome Rozek
Subject: ETX Express - GigE Testing

Hi Neal,
You mentioned to me yesterday that you were going to be testing the Gigabit Ethernet functionality of the ETX-Express modules today.
Did this happen? Please let us know status when you can as Kyle is very anxious to get them.

Thank you for your support!



Tony Hallett
Sales Engineer II
tony.hallett@us.kontron.com

Kontron America
14118 Stowe Drive
Poway, CA 92064
Tel: 800.523.2320 Ext. 3271
Fax: 858.677.0898
www.kontron.com

EXHIBIT 8, PAGE 34

1/2/2008

Kyle Virgin

REDACTED

From: Neal Fischer [mailto:neal.fischer@us.kontron.com]
Sent: Thursday, October 27, 2005 8:41 PM
To: Kyle Virgin
Cc: Adis Galesic
Subject: New EI BIOS for ETXexpress-PM - EI01R012.ROM
Importance: High

Kyle,

After testing and testing this latest BIOS I believe this may work to solve different problems you are seeing.

Note: The default is set for your 8.9" display (1024 x 600), but this can be changed to 1280 x 768 for the 12.1".

BIOS Setup works fine IF you leave Quiet Boot Disabled. If you enable Quiet Boot (to allow the EI logo to appear then multiple bugs show up) including "cant find boot disk", the "black screen of death".

Please try this out. I will talk to you later.

Sincerely,
Neal

	
Neal Fischer Project Manager, <i>Embedded Modules EPC</i>	Kontron America 3178 Laurelview Court Fremont, CA 94538-6535
	Tel: (800) 995-7560 (main) (510) 438-7360 (direct) Cell: (408) 888-1150 Fax: (510) 490-2360
neal.fischer@us.kontron.com	www.kontron.com

EXHIBIT 9, PAGE 35

Kyle Virgin

From: Kyle Virgin
Sent: Tuesday, January 17, 2006 5:57 PM
To: Niels Enevoldsen
Cc: chris.swanson@us.kontron.com
Subject: FW: Shipment...
Attachments: Kyle Virgin (vCard).vcf

Niels,

I have to have 4 GigE ETXexpress modules in-hand tomorrow morning (1-18-2006) as we discussed. I will be sending 1 unit back for you to check out for problems.

Thanks
-Kyle

From: Kyle Virgin
Sent: Tuesday, January 17, 2006 5:52 PM
To: 'Niels Enevoldsen'
Cc: 'chris.swanson@us.kontron.com'
Subject: Shipment...

Niels,

Please ship modules to the address below Attn: Kyle Virgin

Thank You,

Kyle Virgin
kvirgin@exceptionalinnovation.com

Director of Hardware Engineering
Exceptional Innovation
480 Olde Worthington Road
Suite 350
Westerville, Ohio 43082
Direct (614) 901-8343
Main (614) 901-8899
Fax: (614) 901-8896
My vCard is attached to this email.
Please double-click, open and then
save and close.

<http://www.exceptionalinnovation.com>

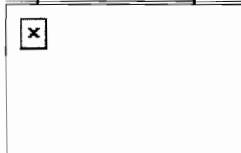


EXHIBIT 10, PAGE 36

1/2/2008

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EXHIBIT 10, PAGE 37

1/2/2008

Kyle Virgin

From: Kyle Virgin
Sent: Wednesday, January 18, 2006 1:00 PM
To: Niels Enevoldsen
Cc: Tony Hallett; Larry Heisler
Subject: RE: Shipment...

Niels,

Are you able to ship these completed Gig ETXexpress modules to us today for tomorrow delivery? We need to have a discussion as to where you guys are at for shipping us quantity units? We were supposed to have 50 Gig ETXexpress units by end of December 2005 but never received them. Currently we have 1 dev unit. What is the hold-up? We have units to build and have no modules to fill them. Please give me an update as to where you are at.

Thank you
-Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Tuesday, January 17, 2006 5:55 PM
To: Kyle Virgin
Cc: Tony Hallett; Larry Heisler
Subject: RE: Shipment...

Hello Kyle,

We have the replacement Galveston board here in Fremont, but we do not have the memory & heat spreader assy. in-house. We have arranged for an a.m. delivery tomorrow from San Diego and will then test the complete system before shipment to you, to include through holes for the HSP.

We will do our best to get the additional 3 system out also.

Best regards,

Niels Enevoldsen

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Tuesday, January 17, 2006 2:52 PM
To: Niels Enevoldsen
Cc: Chris Swanson
Subject: Shipment...

Niels,

Please ship modules to the address below Attn: Kyle Virgin

Thank You,

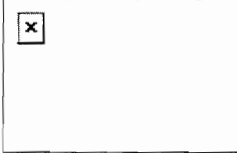
Kyle Virgin
kvirgin@exceptionalinnovation.com

Director of Hardware Engineering

EXHIBIT 11, PAGE 38

Exceptional Innovation
480 Olde Worthington Road
Suite 350
Westerville, Ohio 43082
Direct (614) 901-8343
Main (614) 901-8899
Fax: (614) 901-8896
My vCard is attached to this email.
Please double-click, open and then
save and close.

<http://www.exceptionalinnovation.com>



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EXHIBIT 11, PAGE 39

1/2/2008

Kyle Virgin

From: Kyle Virgin
Sent: Monday, January 23, 2006 3:38 PM
To: Niels Enevoldsen
Subject: RE: Broken Modules...

Niels,

It is Fedex # 792493817543 Signed by "D. Suarez"

-Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Monday, January 23, 2006 2:23 PM
To: Kyle Virgin
Subject: RE: Broken Modules...

Hello Kyle,

Can you pls. provide carrier an tracking information on this shipment?

Regards,

Niels Enevoldsen

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Thursday, January 19, 2006 3:01 PM
To: Niels Enevoldsen
Cc: Larry Heisler; Tony Hallett
Subject: Broken Modules...

Niels,

3 of the 4 modules are broken. 1 module for the 12.1" is the only working unit. I have re-flashed the BIOS to make it an 8.9" for testing. I will be shipping these three units out tomorrow along with the broken dev unit for a total of 4. We had a long meeting today and we missed the ship time for all of them to go out. I'll overnight them tomorrow so you will get them Monday morning.

These three units have broken parts falling off the modules that are inside the static bags. They came that way with poor packing from Kontron.

Please send me 3 modules ASAP that are individually wrapped with 3 layers of bubble wrap to ensure module safety.

Thank You,

Kyle Virgin
kvirgin@exceptionalinnovation.com

Director of Hardware Engineering
Exceptional Innovation
480 Olde Worthington Road

EXHIBIT 12, PAGE 40

1/2/2008

Suite 350
Westerville, Ohio 43082
Direct (614) 901-8343
Main (614) 901-8899
Fax: (614) 901-8896
My vCard is attached to this email.
Please double-click, open and then
save and close.

<http://www.exceptionalinnovation.com>



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EXHIBIT 12 PAGE 41

1/2/2008

Kyle Virgin

From: Kyle Virgin
Sent: Wednesday, January 25, 2006 6:25 PM
To: Tony Hallett; Larry Heisler; Niels Enevoldsen
Cc: Chris Swanson; S Moorer; Adis Galesic; Matthias Huber
Subject: RE: Schedule...

Tony,

You name the time and I'll be there. Anytime is good.

Thanks
-Kyle

From: Tony Hallett [mailto:Tony.Hallett@us.kontron.com]
Sent: Wednesday, January 25, 2006 5:13 PM
To: Kyle Virgin; Larry Heisler; Niels Enevoldsen
Cc: Chris Swanson; S Moorer; Adis Galesic; Matthias Huber
Subject: RE: Schedule...

Hi Kyle,
I just wanted to let you know that we are finalizing the delivery schedule for you now. We plan to have it completed and approved tomorrow.
What is your availability tomorrow as Jerry and I would like to see if we can discuss it with you via a conference call?

Please let us know what time would be best for you.

Thank you.

Tony Hallett
Senior Sales Engineer

Kontron America
14118 Stowe Drive
Poway, CA 92064
Tel: 800.523.2320 Ext. 3271
Fax: 858.677.0898
E-Mail: tony.hallett@us.kontron.com
www.kontron.com

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Wednesday, January 25, 2006 5:08 AM
To: Larry Heisler; Tony Hallett; Niels Enevoldsen
Cc: Chris Swanson; seale@st-holdings.com; Adis Galesic
Subject: Schedule...

Gentlemen,

EXHIBIT 13, PAGE 42

1/2/2008

I have still not received the promised production schedule of ETXexpress delivery to EI from anyone at Kontron. This was discussed last week. I also have not received any information on the latest BSP for the X-Board.

Can someone please get me this information today? We have been out of time for weeks.

P.S. So far the 8.9 BIOS module is working fine. We should have the 12.1" up today. Adis, did you figure out what happened to the module I have that is stuck in "S5"?

Thank you
-Kyle

From: Larry Heisler [mailto:larry.heisler@us.kontron.com]
Sent: Tue 1/24/2006 1:18 PM
To: Kyle Virgin; Tony Hallett; Niels Enevoldsen
Subject: RE: Overnight shipment

Kyle,

Yes, I will make sure that the Kontron badge is not placed on the HSP.

Larry

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Tuesday, January 24, 2006 10:20 AM
To: Tony Hallett; Niels Enevoldsen
Cc: Larry Heisler
Subject: RE: Overnight shipment

Tony,

I haven't heard from Jerry. We would like the ETXexpress modules to show up without the "Kontron" badge on the HSP.

Is this ok?

-Kyle

From: Tony Hallett [mailto:Tony.Hallett@us.kontron.com]
Sent: Tuesday, January 24, 2006 11:57 AM
To: Kyle Virgin; Niels Enevoldsen
Cc: Larry Heisler
Subject: RE: Overnight shipment

Hi Kyle,
I talked to Niels and he told me he is currently working on getting you 2 more out. He will let you know when they hit the shipping dock.
Also, has Jerry contacted yet about a visit? He told me he was planning to come out and see you.

Let me know when you have a moment.

Thank you.

EXHIBIT 13, PAGE 43

1/2/2008

Tony Hallett
Senior Sales Engineer

Kontron America
14118 Stowe Drive
Poway, CA 92064
Tel: 800.523.2320 Ext. 3271
Fax: 858.677.0898
E-Mail: tony.hallett@us.kontron.com
www.kontron.com

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Tuesday, January 24, 2006 7:07 AM
To: Niels Enevoldsen
Cc: Larry Heisler; Tony Hallett
Subject: RE: Overnight shipment

Tony,

We just received the invoice for these 4 modules Niels shipped last week. Why are we not getting 4 new modules instead of 2? Is there an availability problem? We'll pay for 4 when we receive 4 working modules.

Let me know...
Thanks
-Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Monday, January 23, 2006 8:03 PM
To: Kyle Virgin
Cc: Larry Heisler; Tony Hallett
Subject: Overnight shipment

Hello Kyle,

We have 2 x ETXE-PM-760, P/N 380021024200EX2 in-route to you.

Best regards,

Niels Enevoldsen

P.S. One is flashed with the BIOS for the 12.1" display, the other with BIOS for the 8.9".

EXHIBIT 13, PAGE 44

1/2/2008

Kyle Virgin

From: Kyle Virgin
Sent: Thursday, January 26, 2006 10:00 AM
To: Niels Enevoldsen; Larry Heisler; Adis Galesic
Cc: Tony Hallett; S Moorer; Matthias Huber; Jerome Rozek
Subject: RE: ETXexpress Update...

Niels,

That will be fine. How long do you run your test?

Thanks
 -Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Wednesday, January 25, 2006 6:34 PM
To: Kyle Virgin; Larry Heisler; Adis Galesic
Cc: Tony Hallett; S Moorer; Matthias Huber; Jerome Rozek
Subject: RE: ETXexpress Update...

Hello Kyle,

I'm really sorry about the damaged shipment and now this module going bad, however, all boards being shipped out are going through the following test procedure:

In the board test station the CPLD is programmed and all peripherals are tested, upon completed test the system is booted from IDE HD with Windows XP.

The board is then tested in a Brownsville board running Windows XP and the Gigabit Ethernet is here tested seperately.

I will send you one more board out today, do you want the 12.1" BIOS loaded this this?

Best regards,

Niels Enevoldsen

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Wednesday, January 25, 2006 1:20 PM
To: Niels Enevoldsen; Larry Heisler; Adis Galesic
Cc: Tony Hallett; Seale Moorer; Matthias Huber; Jerome Rozek
Subject: ETXexpress Update...

Gentlemen,

I spoke to Adis earlier and let him know the good news and bad news.....

Good News: I still have an 8.9 BIOS unit up and running from the 2 new modules Niels sent me. This unit has been powered on/off around 15 times so far and has been running 24/7 for 2 days. It's so far so good.

EXHIBIT 14, PAGE 45

1/2/2008

Bad News: I powered up the 12.1 BIOS unit today on the Laredo. It came up and sat on the XP desktop for about 5 minutes then the fan quit working and 1 second later the ATX power supply blew up (smoke came out!) After this happened I was skeptical. I thought the power supply could have just went bad but not likely. I proceeded to try this module in our baseboard only because it is fuse protected. As soon as I applied power it blew the 5 amp fuse on our board.

So again, I have another bad module. At what level of testing are you guys going through before you send me these modules? I'm getting lemons here. When can I expect more working units? The module I have here is 1 out of 6 that works.

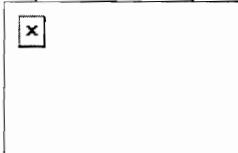
P.S. I have a copy of Intel's TAT program and the processor is running at 48C (118F) inside our enclosure at the LM43. This is an optimum temperature.

Thank You,

Kyle Virgin
kvirgin@exceptionalinnovation.com

Director of Hardware Engineering
Exceptional Innovation
480 Olde Worthington Road
Suite 350
Westerville, Ohio 43082
Direct (614) 901-8343
Main (614) 901-8899
Fax: (614) 901-8896
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EXHIBIT 14, PAGE 46

1/2/2008

Kyle Virgin

From: Kyle Virgin
Sent: Wednesday, January 25, 2006 8:08 AM
To: Larry Heisler; Tony Hallett; Niels Enevoldsen
Cc: chris.swanson@us.kontron.com; Seale Moorer (seale@st-holdings.com); Adis Galesic (adis.galesic@us.kontron.com)
Subject: Schedule...

Gentlemen,

I have still not received the promised production schedule of ETXexpress delivery to EI from anyone at Kontron. This was discussed last week. I also have not received any information on the latest BSP for the X-Board.

Can someone please get me this information today? We have been out of time for weeks.

P.S. So far the 8.9 BIOS module is working fine. We should have the 12.1" up today. Adis, did you figure out what happened to the module I have that is stuck in "S5"?

Thank you
-Kyle

From: Larry Heisler [mailto:larry.heisler@us.kontron.com]
Sent: Tue 1/24/2006 1:18 PM
To: Kyle Virgin; Tony Hallett; Niels Enevoldsen
Subject: RE: Overnight shipment

Kyle,

Yes, I will make sure that the Kontron badge is not placed on the HSP.

Larry

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Tuesday, January 24, 2006 10:20 AM
To: Tony Hallett; Niels Enevoldsen
Cc: Larry Heisler
Subject: RE: Overnight shipment

Tony,

I haven't heard from Jerry. We would like the ETXexpress modules to show up without the "Kontron" badge on the HSP.

Is this ok?

-Kyle

From: Tony Hallett [mailto:Tony.Hallett@us.kontron.com]
Sent: Tuesday, January 24, 2006 11:57 AM

To: Kyle Virgin; Niels Enevoldsen
Cc: Larry Heisler
Subject: RE: Overnight shipment

Hi Kyle,
I talked to Niels and he told me he is currently working on getting you 2 more out. He will let you know when they hit the shipping dock.
Also, has Jerry contacted yet about a visit? He told me he was planning to come out and see you.

Let me know when you have a moment.

Thank you.

Tony Hallett
Senior Sales Engineer

Kontron America
14118 Stowe Drive
Poway, CA 92064
Tel: 800.523.2320 Ext. 3271
Fax: 858.677.0898
E-Mail: tony.hallett@us.kontron.com
www.kontron.com

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Tuesday, January 24, 2006 7:07 AM
To: Niels Enevoldsen
Cc: Larry Heisler; Tony Hallett
Subject: RE: Overnight shipment

Tony,

We just received the invoice for these 4 modules Niels shipped last week. Why are we not getting 4 new modules instead of 2? Is there an availability problem? We'll pay for 4 when we receive 4 working modules.

Let me know...
Thanks
-Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Monday, January 23, 2006 8:03 PM
To: Kyle Virgin
Cc: Larry Heisler; Tony Hallett
Subject: Overnight shipment

Hello Kyle,

We have 2 x ETXE-PM-760, P/N 380021024200EX2 in-route to you.

Best regards,

Niels Enevoldsen

EXHIBIT 15, PAGE 48

1/2/2008

P.S. One is flashed with the BIOS for the 12.1" display, the other with BIOS for the 8.9".

EXHIBIT 15, PAGE 49

1/2/2008

Kyle Virgin

From: Kyle Virgin
Sent: Saturday, January 28, 2006 9:23 AM
To: Niels Enevoldsen
Cc: Larry Heisler; Tony Hallett; Jerome Rozek; Seale Moorer (seale@st-holdings.com)
Subject: RE: ETXexpress Module.....

Niels,

If that board works on your end then my Laredo board must be bad. I have not hooked it back up since it blew up my ATX power supply. I think I need to send it back to Kontron and let you check it out to be safe.

I'll send it out on Monday but I will need a replacement pronto by Tuesday in case I need to use it during the week. This week will be a very busy week for us as we approach our FCC and UL testing.

I'm glad you see the problem with "S5" just like I did.
 The 10/100 boards have never had this issue.

Let me know...

Thanks
 -Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Fri 1/27/2006 7:45 PM
To: Kyle Virgin
Cc: Larry Heisler; Tony Hallett; Jerome Rozek
Subject: RE: ETXexpress Module.....

Hello Kyle,

We received your two boards back and see the problem on S/N 343697 with the "S5 state", the other board S/N 343696 boot up ok! This is the one that blows your fuse!

I also got your disturbing VM message about the latest board you received today going into the "S5 state", because of these incidents and other data collected from you over the past couple of weeks we have assembled an engineering team to look into these problems pronto and will not send you more boards before these issues has been resolved.

I will keep you informed on our progress.

Best regards,

Niels Enevoldsen

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Friday, January 27, 2006 1:23 PM
To: Niels Enevoldsen

EXHIBIT 16, PAGE 50

Cc: Larry Heisler; Tony Hallett; Adis Galesic; Seale Moorer
Subject: ETXexpress Module.....

Niels,

It looks like another one bites the dust. The 4th and final module from the original 4 you sent me has stopped working. After taking a close look at the copper heatsink, I found a SMD part stuck in between the fins. The unit is drawing current now and blows our 5A fuse. This is the last module that was packaged poorly from the 4 that were sent last week. I will be sending this one back on Monday and you should receive on Wednesday. I have not tried the single unit I received today from you. I'm getting hesitant to try the new ones. The old 10/100 modules work fine and have been working fine. How do you want to handle this?

Thank You,

Kyle Virgin
kvirgin@exceptionalinnovation.com

Director of Hardware Engineering
Exceptional Innovation
480 Olde Worthington Road
Suite 350
Westerville, Ohio 43082
Direct (614) 901-8343
Main (614) 901-8899
Fax: (614) 901-8896
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1/2/2008

Kyle Virgin

From: Kyle Virgin
Sent: Tuesday, January 31, 2006 7:23 AM
To: Seale Moorer (seale@st-holdings.com)
Subject: FW: BIOS Video Performance Issue...

Seale,

Maybe we should start sending Kontron a bill :)

-Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Mon 1/30/2006 7:41 PM
To: Kyle Virgin
Subject: RE: BIOS Video Performance Issue...

Hi Kyle,

Yes you are right, I just spoke to Chris, he will send you a new version shortly.

Best regards,

Niels Enevoldsen

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Monday, January 30, 2006 3:17 PM
To: Chris Swanson; Larry Heisler
Cc: Niels Enevoldsen; Seale Moorer; Tony Hallett
Subject: BIOS Video Performance Issue...

Chris,

I figured out what is causing the video performance hit on the new BIOS. Take a real good look at your BIOS processor speed stepping code. If I go into the BIOS and set the processor speed to maximum, it works fine. I suspect there is a cross-up in the BIOS table even though the default setting is automatic. When the system boots, the BIOS reports that the processor is a 600Mhz. This seems strange to me. Is that right? My gut feeling tells me no. I don't know if any of this is related to the "S5" state but my gut feeling again tells me that some bugs are still lingering.

P.S. Chris, I played the "Robotica" 720p video in Windows Media Player 9 and 10 and it hits 100% on the processor. When I set the BIOS to maximum processor speed, it runs at 45-50%

Thank You,

Kyle Virgin
kvirgin@exceptionalinnovation.com

Director of Hardware Engineering
Exceptional Innovation

EXHIBIT 17, PAGE 52

1/2/2008

480 Olde Worthington Road
Suite 350
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Direct (614) 901-8343
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Kyle Virgin

From: Kyle Virgin
Sent: Sunday, April 02, 2006 10:40 AM
To: Ruth Davis
Cc: Tony Hallett; Niels Enevoldsen
Subject: RE: ETXe delivery schedule and GP8 status

The announcement is a marketing partnership with HP. I still need to get final BIOS settings to Niels. I have updated settings from the EHX trade show last week. I'll get this info to him this week. All modules performed WELL at the trade show. I'll be in-touch soon.

Thanks
-Kyle

From: Ruth Davis [mailto:ruth.davis@us.kontron.com]
Sent: Fri 3/31/2006 11:18 AM
To: Kyle Virgin
Cc: Tony Hallett; Niels Enevoldsen
Subject: ETXe delivery schedule and GP8 status

Hi Kyle,

Tony and I have been trying to get a hold of you but to no avail so I'm sending you an email. We wanted to let you know that the 250 units of the ETXexpress for your end of March shipment will be delayed. We are looking at the end of April. We are sorry for the inconvenience. We'll keep you updated as we get more info.

We will be seeing the GP8 boards in the next couple of weeks. We'll get one out to you as soon as we get them

I looked on your website for any announcements and did not see anything regarding a partnership. What is the status?

Best Regards,
Ruth

Ruth Davis | Kontron America | Strategic Account Manager | M: 630.363.7371 | O: 630.469.0680 | ruth.davis@us.kontron.com

EXHIBIT 18, PAGE 54



June 29, 2006

Exceptional Innovation
Attention: Kyle Virgin
480 Olde Worthington Road
Suite 350
Westerville, Ohio 43082

Dear Kyle,

Kontron strives to achieve the highest level of integrity and quality in the manufacturing of its products. On occasion we find it necessary to perform a corrective action on certain products that we find do not meet our exacting standards of quality, and reliability.

Upon conducting failure analysis on customer returns of the ETXexpress-PM, we have identified that certain board revisions have a weakness in their power supply circuits. The units may exhibit component failures clustered around a specific set of power supply circuits. The circuitry in question is based on a pair of Intersil switching power supply controllers.

The power supply failures are found in units based on the following versions:

Galveston board revision BX.X, P/N 38002-0000-XX-X
(Rev. BX.5 is not affected; all earlier versions should be updated to BX.5)

The root cause of the failure has been identified and a remedy consisting of two minor circuit changes and revised power sequencing PLD (programmable logic device) code has been tested and validated.

Based upon our records, Exception Innovation has received up to 50 units that may contain the affected revision of the PCB. Kontron will upgrade the affected units at no charge. To initiate the upgrade process, please contact Kontron Customer Service toll-free at (800) 480-0044 for an RMA Number to return the boards.

If you have any questions and/or require additional information, please feel free to contact us.

Regards,

A handwritten signature in black ink, appearing to read "Matthias Huber", with a long horizontal line extending to the right.

Matthias Huber
Kontron America
Director, Embedded Modules Division

CC: John Brady – Manager Technical Services
Ruth Davis – Strategic Account Manager

Kontron America
14118 Stowe Drive, Poway, CA 92064-7147
1-800-523-2320 • Tel: (858) 677-0877 • Fax: (858) 677-0898 • www.kontron.com

EXHIBIT 19, PAGE 55

L4-0233 06/06/05

Kyle Virgin

From: Kyle Virgin
Sent: Wednesday, July 05, 2006 8:17 AM
To: Niels Enevoldsen
Cc: Ruth Davis; Robert Hover; John Brady; Tim McMahon; Seale Moorer; Matthias Huber
Subject: RE: EI RMA for ETXexpress...
Attachments: Except Innovation - Galveston letter 6-29-06.pdf

Niels,

We have a few more to send back to you that have failed also. You'll need to send us replacement modules before we can swap them out. This needs to get done ASAP. Please let me know the progress.

Seale, please read the attached letter.

Thank You
 -Kyle

From: Niels Enevoldsen [mailto:Niels.Enevoldsen@us.kontron.com]
Sent: Friday, June 30, 2006 5:01 PM
To: Kyle Virgin
Cc: Ruth Davis; Robert Hover; John Brady
Subject: FW: EI RMA for ETXexpress...

Hi Kyle,

We have finalized our investigation on the 3 x ETXexpress-PM boards returned to us on RMA 142176.

Symptom=No Boot!
 361215 (EX2 for 8.9" BIOS) Problem, malfunctioning Intersil switching power supply contrl.
 360849 (EX3 for 12.1" BIOS) Problem, malfunctioning Intersil switching power supply contrl
 360854 (EX3 for 12.1" BIOS) Problem, capacitor shorted out!

We have done a very extensive investigation on these boards and our findings are outlined in the attached letter, during this test, we had to solder wires (test points), replace IC's and cap's to various places on these boards and for that reason I would rather replace them than try to clean them up.

I will initiate the replacement next week.

Best regards,

Niels Enevoldsen

From: Sherri Silva
Sent: Wednesday, May 31, 2006 1:09 PM
To: Niels Enevoldsen
Subject: FW: EI RMA for ETXexpress...

Niels,

The bds RMA 142176 listed below are here. Should I forward the bds to you?

EXHIBIT 20, PAGE 56

1/2/2008

Thank you, Sherri

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Tuesday, May 30, 2006 7:40 AM
To: Sherri Silva
Cc: Niels Enevoldsen; Tony Hallett; Ruth Davis
Subject: EI RMA for ETXexpress...

Sherri,

I need RMA numbers for the following ETXexpress modules.

I have talked to Niels last week about these. All three will not power up. These need to be put onto Kontron's test bench to find out why they have failed. I suspect the module's power supply has failed again. I need to know ASAP why these units have failed.

Below are the serial numbers:

361215 (EX2 for 8.9" BIOS)
360849 (EX3 for 12.1" BIOS)
360854 (EX3 for 12.1" BIOS)

I need the RMA by 1PM EST today so I can overnight it to you for tomorrow delivery.

Thank You,

Kyle Virgin
kvirgin@exceptionalinnovation.com

Director of Hardware Engineering
Exceptional Innovation
480 Olde Worthington Road
Suite 350
Westerville, Ohio 43082
Direct (614) 901-8343
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EXHIBIT 20, PAGE 57

1/2/2008

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EXHIBIT 20, PAGE 58

SENT VIA EMAIL AND REGULAR MAIL



simply connected

480 Olde Worthington Rd.
Suite 350
Westerville, OH 43082

T (614) 901.8899
F (614) 901.8896

www.exceptionalinnovation.com

March 16, 2007

Ms. Sally Ellis
Kontron America, Inc.
14118 Stowe Dr.
Poway, CA 92064

Dear Sally:

I am writing to respond to your request for payment on invoice number 412461 in the amount of \$175,059 dated November 30, 2006. Up until recently I believe we have been very prompt in our payment of invoices from Kontron totaling more than \$1.3 million. It was only late last month that I became aware from our hardware engineering department just how poorly the execution on the part of Kontron has been relative to our product orders. Below is a brief timeline identifying what initially had been promised by Kontron and enumerating the many problems and false starts we have encountered along the way:

A kickoff meeting took place with Thomas Sparvik CEO of Kontron and the EI team the first week in April 2005. We were promised production 10/100/1000 modules by 06-2005 at that meeting.

04-2005 – We received a 10/100 module and baseboard to test.
04-2005 – We discovered that we were sent a 10/100 module after power up and not a 10/100/1000 module and immediately requested to have this switched out for a 10/100/1000 Kontron stalled us for 2 months on this
05-2005 – Sent EI BIOS requirements to Kontron
06-2005 – EI Placed initial order for ~20 modules to be delivered by 07-2005
06-2005 – Waiting on Kontron CPLD bug fixes with numerous phone calls to Neal Fisher and was told it would be 3 more months for the 10/100/1000
07-2005 – Waiting on Kontron BIOS video bug fixes with numerous phone calls to Neal Fisher
07-2005 – Kontron has numerous engineers quit that we're working on our project
08-2005 – Modules show up last week of month with BIOS bugs and no dynamic fan support
09-2005 – First CEDIA trade show with BUGGY modules with failures of modules at show
10-2005 - Waiting on Kontron CPLD bug fixes with numerous phone calls to Neal Fisher

Ms. Sally Ellis
March 16, 2007
Page 2

10-2005 - Waiting on Kontron BIOS bug fixes with numerous phone calls to Neal Fisher
11-2005 - Waiting on Kontron CPLD bug fixes with numerous phone calls to Neal Fisher
12-2005 - Waiting on Kontron BIOS bug fixes with numerous phone calls to Neal Fisher
12-2005 - Last week of month we receive first 10/100/1000 modules that appear to be fine
1-2006 - CES trade show we have numerous failures of modules that totally die after a few hours
1-2006 - Kontron's Neal Fisher quits - We now have no support manager on our project
2-2006 - Waiting on Kontron CPLD bug fixes with numerous phone calls
3-2006 - Kontron hires Niels Enevoldsen
3-2006 - EI is shipped numerous modules (30+) that weren't packaged correctly and parts were falling off the PCB's - we sent them all back
4-2006 - After numerous phone calls from EI to Kontron, EI tells Kontron they have an issue with their onboard power supply
4-2006 - Kontron confirms they have a design problem and prior and future modules will have to be had re-worked there
5-2006 - EI discovers more Kontron BIOS and CPLD bugs
6-2006 - Numerous BIOS bug fixes were coming to us regarding fan speed control and speed stepping
7-2006 - Received replacement modules that were broken
8-2006 - BIOS is finalized after numerous bug fixes

Based on Kontron's initial representations as to their ability to deliver fully functional, quality parts for our hardware, we made announcements to our industry in the fall of 2005 that we would be ready to deliver hardware in time for a major tradeshow in January of 2006. The inability to meet that timeframe has caused immeasurable damage to our reputation.

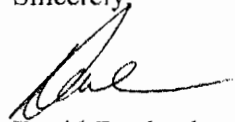
In addition, we have employed two highly paid hardware engineers who spent close to a year assisting your personnel in debugging your product so that it would be suitable for use. This is time they had to spend that diverted their efforts from tasks that otherwise would have been productive for our company.

On top of that, we have already made payment to Kontron in excess of \$1.3 million in full payment of invoices for product that was late in delivery and failed to perform to specification until our personnel identified the problems and communicated this back to Kontron.

Ms. Sally Ellis
March 16, 2007
Page 3

In order to resolve this matter, I am proposing that you adjust the invoice in question to \$75,059. Upon confirmation of your acceptance of these terms, we are prepared to wire you that balance as well as payment of \$35,320 (total \$110,379) to settle all outstanding invoices to Kontron.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Freeland', with a stylized flourish at the end.

David Freeland
Chief Financial Officer

cc: Thomas Sparvik
Gordon Litt, Bricker & Eckler LLP

Heikaus Weaver, Chris

From: David Freeland [DFreeland@life-ware.com]
Sent: Tuesday, June 12, 2007 9:02 AM
To: Jerome Rozek
Subject: FW: Outstanding Invoices
Importance: High

Jerry,

Did you receive this email? Is there any opportunity to resolve?

Thanks,

Dave



David Freeland | Chief Financial Officer | T (614) 901.8697 | F (614) 901.8698 | M (614) 370.3536
dfreeland@life-ware.com | www.life-ware.com

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From: David Freeland
Sent: Wednesday, May 30, 2007 5:55 PM
To: 'Jerome Rozek'
Cc: Kyle Virgin; Seale Moorer; 'thomas.sparvik@us.kontron.com'
Subject: RE: Outstanding Invoices
Importance: High

Jerry,

The price reduction on the units was due to Kontron passing on a drop in price they received for the product. It does not appear to have anything to do with the problems and delays in the delivery. As luck would have it however, the delivery was delayed for a sufficient period of time that the majority of the units were priced at the lower level.

Not to play tit-for-tat but in contrast to the 3 complimentary emails you received from EI, I am attaching 15 emails between Exceptional Innovation and Kontron enumerating the many problems encountered along the way.

We simply do not feel that a \$17,500 adjustment is adequate in this situation. I further understand from a conversation with John Chotkowski (collection agent) that you are now taking that off the table. We would like to resolve this issue but feel justified in seeking something closer the \$100,000 figure I had previously requested. (FYI – the ETX express modules make up \$912K of the \$1.550M in product we purchased from Kontron) We would like to continue our relationship with Kontron and move to the Core 2 Duo. On that line, we would consider an adequate credit towards those purchases.

I would like to keep the dialogue open on this.

EXHIBIT 22 PAGE 62

1/10/2008

Thanks,

Dave



David Freeland | Chief Financial Officer | T (614) 901.8697 | F (614) 901.8698 | M (614) 370.3536
dfreeland@life-ware.com | www.life-ware.com

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From: Jerome Rozek [mailto:jerome.rozek@us.kontron.com]
Sent: Friday, May 11, 2007 9:58 AM
To: David Freeland
Subject: Outstanding Invoices

Hello Dave,

Regarding our conversation Tuesday, attached are some e-mails that validate my statement that Kontron supported Exceptional Innovation with the following:

- No Charge for Custom LCD Display Drivers
- No Charge for Special Application BIOS
- Price Reduction March 2006 on existing orders from \$1053 to \$883 as a good faith gesture for shipment delays

Also as discussed Kontron is willing to extend to Exceptional Innovation (Life-Ware) an additional 10% discount on Invoice #413461 in the amount of \$17,505.90. The new amount on this invoice is \$157,553.10, and needs to be paid immediately.

Under separate cover, I will be sending Kyle the new Core 2 Duo Road Map and availability for the next generation ETX Exp Modules.

Please let me know when you send the payment. Thank you, for taking care of this situation immediately.

Jerry Rozek
Strategic Account Manager
Kontron America
Ofc: 440-237-8815
Cell: 440-503-6351
e-Mail: jerome.rozek@us.kontron.com

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EXHIBIT 22 PAGE 63

1/10/2008

Kyle Virgin

From: Kyle Virgin
Sent: Thursday, March 23, 2006 5:59 PM
To: Ruth Davis
Subject: RE: new ETXexpress pricing

AWESOME!!! Next time you are in town, I'll take you to dinner!!!

Thank You
-Kyle

From: Ruth Davis [mailto:ruth.davis@us.kontron.com]
Sent: Thursday, March 23, 2006 4:00 PM
To: Kyle Virgin
Cc: Tony Hallett
Subject: RE: new ETXexpress pricing

Kyle,

Yes it includes 1 GB RAM, HSP, Heatsink without fan and custom BIOS. You can believe it! Normally, we charge for the custom BIOS but because you guys are special and we like you we're not charging yo.

Take care,
Ruth

Ruth Davis | Kontron America | Strategic Account Manager | M: 630.363.7371 | O: 630.469.0680 | ruth.davis@us.kontron.com

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Thursday, March 23, 2006 2:38 PM
To: Ruth Davis
Subject: RE: new ETXexpress pricing

Ruth,

This does include 1GB RAM, HSP, Heatsink without fan and custom BIOS right?

Thanks
-Kyle

From: Ruth Davis [mailto:ruth.davis@us.kontron.com]
Sent: Thursday, March 23, 2006 2:49 PM
To: Kyle Virgin
Subject: RE: new ETXexpress pricing

Kyle,

You are quite correct.

Regards,
Ruth

Ruth Davis | Kontron America | Strategic Account Manager | M: 630.363.7371 | O: 630.469.0680 | ruth.davis@us.kontron.com

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1/2/2008

From: Kyle Virgin [mailto:kvirgin@exceptionalinnovation.com]
Sent: Thursday, March 23, 2006 8:41 AM
To: Ruth Davis
Subject: RE: new ETXexpress pricing

Ruth,

Are you telling me that the modules we receive from this point forward in-house are going to be priced at \$883 for each unit?

Thanks
-Kyle

From: Ruth Davis [mailto:ruth.davis@us.kontron.com]
Sent: Wednesday, March 22, 2006 8:53 PM
To: Kyle Virgin
Cc: Tony Hallett
Subject: new ETXexpress pricing

Hi Kyle,

In going through the exercise of quoting Arrow on the 380021024200EX2/EX3 [CPU Module w/RAM, Heat Spreader Plate, and Heat sink (without fan)], we were able to get better pricing from our CM. I have included the pricing for your review. Moving forward we will apply the new price of \$883 to your existing orders. Hopefully this will make your day.

Best Regards,
Ruth

	
Ruth Davis <i>Strategic Account Manager Central Region</i> ruth.davis@us.kontron.com	Kontron America 192 Crest Road Glen Ellyn, IL 60137 Office: 630.469.0680 Mobile: 630.363.7371 www.kontron.com

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is Rutan & Tucker, LLP, 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On January 11, 2008, I served the following described as:

**PLAINTIFF AND CROSS-DEFENDANT EXCEPTIONAL
INNOVATION'S EARLY NEUTRAL EVALUATION CONFERENCE
STATEMENT**

on all parties identified for Notice Of Electronic Filing generated by the Court's CM/ECF system in this case on this date in the following manner:

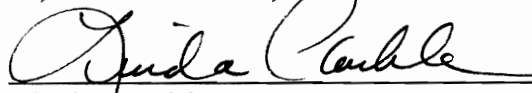
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Co-Counsel for Plaintiff and Counter-Defendant
EXCEPTIONAL INNOVATION, LLC

☒ **(BY ELECTRONIC SERVICE)** by causing the document to be served via the Court's ECF Filing System.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED on January 11, 2008, at Costa Mesa, California.


Linda Cauble